notes that loose out -of-band emission limits provide perfectly acceptable adjacent channel interference protection when adjacent channel licensees are operating compatible systems, but when adjacent channel systems are not compatible, a more stringent out of band emission limit is necessary to provide an appropriate level of interference protection. The Telecommunications Industry Association (TIA) also supports the Coalition's out-of-band emission limits, which are also imposed in the PCS band. TIA asserts that if flexibility is provided to the licensee to utilize either FDD or TDD, out of band emissions will have to be reduced to a level that will provide reasonable protection to an adjacent channel licensee. TIA further argues that the dual mask approach proposed by the Coalition restricts out-of-band emissions and mitigates potential adjacent channel interference where non-synchronized technologies are deployed.

127. We also agree with the Coalition that equipment on the LBS and UBS channels (both base stations and stations at a customer's premise) should be required to attenuate the power on any frequency outside a licensee's authorized spectrum.[229] Accordingly, we are adopting the Coalition's recommendation that all LBS and UBS channels emissions be attenuated below the transmitter power by at least 43 + 10log(P) dB on any channel outside a licensee's spectrum. We note that this is the same as the general emission mask the Commission adopted for operations on PCS, the 700 MHz band and other services.

128. We note TIA's concerns that requesting more stringent out of band emissions from an adjacent channel licensee, upon written request, is an unworkable solution for further reduction in out-of-band emissions. However, we believe that is appropriate to allow licensees to request stricter out-of-band emission limitations when there is a documented case of interference caused by out-of-band emissions between base stations. We believe that requiring the requesting licensee to document its interference claims will ensure that such requests will address real problems and avoid specious requests. Therefore, the Commission will require a licensee, upon receiving a documented interference complaint from an adjacent channel licensee, to further reduce its out-of-band emissions by at least 67 + 10log(P) dB. We also agree with the Coalition that additional attenuation should be required where base stations are located in close proximity. So we will require additional attenuation when distances between base station are less than 1.5 km. Finally, we also agree with the Coalition's mobile station emission mask which extends the attenuation from 43 + 10lop(P) at the channel's edge to 55 +10log(P) at 5.5 MHz away from the channel's edge.

129. With respect to BRS channel 1, we clarify that adjacent-channel Mobile Satellite Service (MSS) licensees can seek tighter out-of-band emissions limitations on licensees operating on Channel 1 in cases of documented interference. There may be situations where a tighter out-of-band emissions limit is necessary to protect MSS operations below 2495 MHz. MSS licensees operating in the adjacent band will be able to request such additional protection under the same circumstances as adjacent-channel BRS and EBS licensees.[230]

130. With respect to the MBS, we will allow analog television operations to operate pursuant to the existing out-of-band emission limitations currently in our rules. With respect to other operations, we will apply the same rules we are adopting for the LBS and UBS. We note that the Coalition requested

(Continued from previous page)

the services it will offer and the technology it will employ, the Commission cannot possibly assure that technically-disparate systems will be separated.

[229] Coalition Proposal at 29.

[230] Given the difficulties involved in measuring satellite signals, which can operate at very low-power, we will not require MSS licensees seeking adjacent-channel protection to provide actual measurements of satellite signal levels.

no changes in the out-of-band emission limits for the MBS.[231] However, we believe that the rules we are adopting are more workable than the current rules and will provide sufficient protection to existing operations. Moreover, applying the same emission limitations for digital operations throughout the band will encourage the use of common equipment throughout the band, particularly in those areas where cellularized networks can operate in the MBS without interference from high-power operations.

5. Technology

131. In the *NPRM*, we sought comment on the Coalition's request that we not restrict operation in this band to a particular technology and its assertion that our rules should remain technology-neutral to the maximum extent possible.[232] We noted that the Coalition also raised the issue that second-generation equipment employs two different technologies – FDD and TDD -- and that FDD technology requires a separation between the highest frequency used in one direction and the lowest frequency used in the other direction.[233] Thus, to allow for FDD technology, the Coalition proposed that when this technology is employed by a licensee, the LBS be restricted to subscriber-to-base (upstream) communications and the UBS be restricted to base-to-subscriber (downstream communications). According to the Coalition, this framework would simplify adjacent channel coordination and provide the vendor community with a degree of certainty as to the band usage that will translate into lower equipment costs and smaller equipment. We sought comment on whether we should establish formal channel pairings in the form of fixed channel assignments (FCA) to standardize the separation between channels used upstream and downstream.

132. We agree with the Coalition and the overwhelming majority of Commenters who argue that the band should be technology neutral. Allowing the band to be technology neutral is consistent with our goal to make the spectrum as flexible as possible as it permits licensees and the marketplace to determine which technologies should be utilized. As noted by Gryphon, Earthlink, Sprint, and Twedt and Dudeck, not restricting the band to a particular technology allows licensees and systems operators to deploy either FDD or TDD technology, and freely switch between the two as the technology develops and the marketplace demands evolve. Moreover, as noted by Alvarion, technologies such as next generation FDD and TDD would not thrive in a regulatory environment that restricts flexibility and mandates one technology over another.

133. We disagree with Fixed Wireless Holdings' approach which locks in the technology choice made at the time of licensing. To support its position, Fixed Wireless Holdings points to the Coalition's acknowledgement that both FDD and TDD systems on the same frequencies "creates a heightened risk of co-channel interference." However, we agree with Twedt and Dudeck that the current Rules would allow ITFS or MDS operators to safely use either FDD or TDD technology. Providing users with the flexibility to deploy the technologies of their choice is consistent with the Commission's goal of allowing licensees to operate technology independent. Accordingly, we will not mandate any particular technology in the band.

134. Additionally, we conclude that in order to allow the spectrum to be technology-neutral to

[231] Coalition Proposal at 39.

[232] Coalition Proposal at 11, 15.

[233] The Coalition points out that the Commission's *Interim Report* stated that a separation of at least 30 megahertz between upstream (customer to base) and downstream (base to customer) transmissions is needed to provide sufficient isolation of signals in the duplexer. *See* Coalition Proposal at 16. *See also Interim Report* at 54.

the maximum extent possible, channels utilized for FDD in this spectrum will not be paired by fixed channel assignments. Rather, upstream FDD operations will be permitted in the LBS, and paired with channels in the UBS for downstream communications by dynamic channel assignment (DCA). Channels that are DCA paired select any unused channel in the LBS for upstream operation, which eliminate manual channel pairing, thus promoting more flexibility and an efficient use of the spectrum. We are not, therefore, adopting a requirement for the LBS to be used only for remote, response or mobile station transmissions or for the UBS to be used only for base or main station transmissions. However, this does not preclude the industry from adopting its own standard.[234] An operator is free to use TDD in either the LBS or the UBS. Thus, FDD technology will be used in this spectrum without a priori pairing.

6. Unlicensed "Underlay" Operation

135. As we have consistently noted, one of the underlying goals of this proceeding is to promote increased access to spectrum. In this regard, we noted in the *NPRM* that Intel and Microsoft advocated that we create, or at least preserve, the opportunity to create unlicensed "underlay" rights for very low-powered devices on these channels.[235] Recently, we issued a Notice of Inquiry concerning making additional spectrum available for use by unlicensed devices in the television bands and in the 3650-3700 MHz band.[236] In the Unlicensed NOI, we noted that there have been significant advances in technology that may make it feasible to design new types of unlicensed equipment that would not cause interference to existing services.[237] For example, equipment could be designed that could monitor spectrum before transmitting to avoid interference, or equipment could be designed that could use the Global Positioning System to determine its location and whether there are licensed operators in the area.[238] We also noted that allowing unlicensed operation with minimal technical requirements could potentially permit the development of new and innovative types of devices, such as new wireless data networks.[239]

136. In the *NPRM*, we stated that the proximity of the 2500-2690 MHz band to successful unlicensed technologies in the 2.4 GHz band, and our goal of increasing the intensiveness and efficiency of use of the 2500-2655 MHz band, suggests that it may be appropriate to consider enhancing unlicensed use in the band on a secondary, non-interference basis. While we recognized that unlicensed operations under our Part 15 rules are subject to the condition that the transmitter does not cause interference to authorized services, we stated that we were nonetheless mindful in this context that additional measures may be necessary to ensure that unlicensed operations would not cause interference to existing, licensed operations. In that regard, we noted WCA's belief that Microsoft and Intel's proposals were premature. WCA contended that the necessary technology for mass producing affordable devices capable of measuring and reliably adapting to the presence of background noise or "interference temperature" had not been demonstrated.[240]

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[234] All stations, regardless of their use, must comply with the emissions standard specified for LBS and UBS. *See* Appendix C, Section 27.53, Emission Limits.

[235] Intel Reply Comments in RM-10586, at 5; Microsoft Reply Comments in RM-10586, at 3-4.

[236] Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, *Notice of Inquiry*, 17 FCC Rcd 25632 (2002) ("*Unlicensed NOI*").

[237] *Id.* at 25637 ¶ 13.

[238] *Id.*

[239] *Id.* at 25642 ¶ 21.

[240] Coalition Comments in ET Docket No. 02-135, at 10.

137. Based on our discussions in the Unlicensed NOI and the advent of emerging technologies enhancing the feasibility of unlicensed operations, we sought in the *NPRM* comment on the possibility of allowing enhanced unlicensed operations in the 2500-2690 MHz band. Additionally, we sought comment on technical rules that would permit such operations without interfering with primary operations, such as any restrictions on antenna gain or directivity that might be necessary.[241] Furthermore, we sought comment on whether it is feasible to manufacture affordable transceivers that are capable of using underlay rights where, and only where, such access is offered if some but not all licensees on a given channel allow underlay access. Noting that Part 15 transmitters may not operate in certain restricted bands, including 2655-2690 MHz,[242] we asked whether there were any circumstances under which unlicensed operation could be allowed in the 2655-2690 MHz band without adversely affecting passive sensing operations in the 2655-2700 MHz band.

138. Based upon our review of the record, we decline to permit high-power unlicensed operations in the spectrum at this time. We are not necessarily convinced by Motorola's and Sprint's arguments that high-power unlicensed operations would introduce new sources of interference and create a more uncertain interference environment at the expense of licensees in the band seeking to deploy new services.[243] However, given the complex transition we are undertaking in this band, we believe that allowing high-power unlicensed operations in this band could add an additional layer of complexity that could delay deployment in this band by licensed operators. We are also concerned by the Coalition's assertion that allowing unlicensed use of this spectrum could undermine the evolution of the modified band plan, and BellSouth's related comment that because the current state of unlicensed technology does not permit responsible implementation of unlicensed devices in the spectrum, the uncertainty and novelty of unlicensed use would trouble investors, making them less likely to invest in the band.[244] We note that NAF and a series of other Commenters in favor of allowing unlicensed operations did not provide sufficient scientific evidence in support of their position. Moreover, NAF did not submit sufficient evidence to support its claim that unlicensed underlay operations can be operated on a primary basis without causing interference within the spectrum. Furthermore, we believe that the issue of high-power unlicensed operation can and should be considered in the broader context of other proceedings addressing unlicensed operation. Therefore, we decline to permit unlicensed operations in the band except as indicated above and to the extent already permitted by Part 15 of our Rules.

139. However, we will lift the restriction on unlicensed operation in Section 15.205 of our Rules and permit low-power unlicensed devices to operate on frequencies 2655-2690 MHz under our current Part 15 rules. Given the existence of licensed services in this frequency band, and given the ability of licensed operation to co-exist with unlicensed operations in the 2500-2655 MHz band, we see no reason to maintain this restriction in this band.

7. RF Safety

140. The Coalition's proposal for revisions to the 2500-2690 MHz band includes a recommendation that we amend our RF Safety rules. More specifically, the Coalition contends that we

[241] *NPRM*, 18 FCC Rcd at 6781-6782 ¶ ¶ 143-148.

[242] 47 C.F.R. § 15.205.

[243] Motorola Comments at 3-4; Sprint Comments at 9.

[244] Coalition Comments at 67-68; BellSouth Comments at 26.

should amend Sections 1.1307(b)(2), 2.1091(c) and 2.1093(c)[245] to include MDS and ITFS services.[246] These Rules were enacted pursuant to the National Environmental Policy Act in order to assure the protection of human health and safety from radio frequency radiation exposure. The Commission considers RF safety procedures to be essential in protecting human beings from excessive exposure to RF energy.[247] Accordingly, we sought comment on whether and how we should amend the RF safety rules but received little comments on this issue. We agree with the Coalition that Sections 1.1307(b)(2), 2.1091(c) and 2.1093(c) of our Rules should be amended to include MDS and ITFS services. We believe that equipment in this spectrum as in other areas of the spectrum should provide RF safety to consumers. Therefore, applications for equipment operating under this service must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Accordingly, we are amending those sections of the Rules to allow mobile/portable devices in the band.

8. North American Datum (NAD) 83 Coordinate Data

141. Our rules require the submission of different coordinate data for licensing actions. Applicants submit coordinate data using NAD83 protocol for applications filed on FCC Form 331 but in NAD27 for all other MDS/ITFS forms. In the *NPRM*, we sought comment on the Coalition's proposal that we require applicants to use NAD83 coordinate data and update or convert the current database.[248] We further noted that applications filed through ULS are required to provide NAD83 coordinate data. Inasmuch as applications for this service will be processed through ULS, we conclude that these applications should likewise provide NAD83 coordinate data. We agree with the Coalition that the coordinate information in our ULS database should be consistent. Accordingly, we adopt the Coalition's proposal and will require all future applicants filing BRS/EBS applications to submit coordinate data based on NAD83 coordinate data to facilitate ULS processing. Therefore, all applications filed after the effective date of these rules are required to contain coordinate data based on NAD83 coordinate data.

9. BRS Response Station Hubs

142. Our existing rules regard hubs in the same manner as main stations for application processing purposes. For instance, whereas 47 C.F.R. Section 1.1104 contains a special section on the application fee for signal booster applications and for signal booster certification of completion of construction applications ($70.00 in each instance), the rules do not differentiate between requirements for main station applications and certifications and response station hub applications and certifications. At present, the fee for a response station hub on a Form 331 is $210.00, and the fee for the Form 304A is $610.00.[249] Section 21.909 states that an MDS response station hub application must be filed on a Form 331. Licensees of MDS response station hubs must also file a certification of completion of construction application.[250] Response station hubs, signal booster stations and R channels are considered stand-alone

[245] *See* 47 C.F.R. §§ 1.1307(b) (2), 2.1091(c) and 2.1093(c).

[246] *See* Coalition Proposal at 20, nn.26 and 51.

[247] The existing requirements are located in 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091 and 2.1093.

[248] Coalition Proposal at 56.

[249] *See* 47 C.F.R. §§ 1.1104 and 21.909(c)(1).

[250] 47 C.F.R. § 21.909(h)(i)(2).

stations, and thus have unique facility ID numbers separate from the associated main stations.[251] However, at this time, only signal booster stations are designated for special treatment in the application fee schedule. We do not believe that certifications of completion of construction of two-way hubs will be necessary under the GSA licensing approach that we adopt herein, and accordingly eliminate such filing requirements.

10. Radiation from Stations that are not Engaged in Communications

143. On September 25, 1998, the Commission amended its rules to allow MDS and ITFS licensees to provide a wide range of high-speed, two-way services to a variety of users.[252] On July 29, 1999, the Commission made some additional rule modifications to facilitate the provision of these services.[253] On December 22, 1999, IPWireless requested reconsideration of the Commission's out of band emission limitations.[254] On February 10, 2000, a group of over 100 wireless communications system operators, Commission licensees, equipment manufacturers and consultants who were parties to the Petition for Rulemaking that commenced the Two-Way Proceeding (collectively, Petitioners) did not oppose IPWireless' petition, but sought clarification of Sections 21.909(m) and 74.939(o) of our Rules.[255] The Petitioners indicated that there was some uncertainty within the industry as to the meaning of the language, "Radiation of an un-modulated carrier and other unnecessary transmissions are forbidden."[256]

144. The Petitioners requested clarification that this language requires a response station's transmitter to be biased off so that no RF Gaussian noise is emitted when the station is not engaged in communications.[257] The Petitioners argued that this interpretation assures the protection of the noise floor of adjacent channel and adjacent market licensees against unnecessary emissions from transceivers.[258] On May 11, 2000, the Petitioners and IPWireless notified the Commission that they had reached a compromise concerning the appropriate level of emissions that a response station may generate when not directly engaged in communications with a response hub.

145. The Petitioners and IPWireless requested amendment of Sections 21.909(m) and 74.939(o) of our Rules to provide that when a response station is not in communications with its associated hub, it must restrict its field strength.[259] First, they proposed to set the permissible level of RF

[251] *See* Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Tendered For Filing, Report No. 148, *Public Notice* (Nov. 29, 2000).

[252] *Two-Way R&O*, 13 FCC Rcd at 19112.

[253] Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order on Reconsideration*, 14 FCC Rcd 12764 (1999) (*Two-Way R&O on Recon*).

[254] IPWireless, Inc. Petition for Reconsideration, filed Dec. 22, 1999.

[255] Petitioners' Consolidated Comments and Partial Opposition at 5 (Consolidated Comments) filed Feb. 10, 2000. Although the Commission inadvertently indicated that WCA requested clarification, we take this opportunity to correct the record to reflect that the Petitioners requested clarification of this issue. *See Two-Way FNPRM*, 15 FCC Rcd at 14576.

[256] Petitioners' Consolidated Comments at 6.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 1.

Gaussian noise at 10 microvolts/meter per 1 MHz bandwidth at a distance of 3 meters for response stations utilizing antennas with 6 dB or less gain over isotropic. Second, they proposed to set the permissible level of RF Gaussian noise at 10 microvolts/meter x 10exp[(antenna gain - 6 dB) / 20] per 1 MHz bandwidth at a distance of 3 meters for stations utilizing antennas with more than 6 dB gain over isotropic.[260]

146. In the *NPRM*, the Commission agreed to clarify this issue and sought comment[261] on specific issues relating to this matter.[262] Additionally, we sought comment on comprehensive changes to the interference rules that would apply in these services. Noting that other services do not have similar requirements, we asked Commenters who supported imposition of such a requirement to explain the need for such a requirement in light of other changes we proposed to our technical rules.

147. IPWireless now states that its original proposal to amend Sections 21.909(m) and 74.739(o) of the Rules is no longer appropriate. IPWireless explains that its proposal stemmed from the fact that MDS/ITFS licensees were concerned that TDD devices might be prone to transmitting energy during periods of reception. The Coalition supported IPWireless' proposal arguing that absent the adoption of the restrictions on emissions by subscriber units when not engaged in communications with their base stations, interference may result. Subsequently, however, IPWireless has completed more than two years of field trials and commercial deployment of TDD equipment and has obtained FCC certification for several types of base stations and CPE devices. IPWireless' studies led it to conclude that TDD devices are not a potential source of interference as envisioned by MDS and ITFS Petitioners at the time its petition was filed. We are persuaded by IPWireless' extensive studies and findings on this issue, which are further buttressed by the fact that IPWireless has obtained FCC certification for several types of base stations and CPE devices. Thus, we agree with IPWireless that amending Sections 21.909(m) and 74.739(o) of the Rules is not necessary, and the applicable rules will not be amended.

148. In a related matter, we also sought comment on whether we should prohibit subscriber handsets (CPE) from transmitting unless a base station pilot is present, and whether such a rule was necessary in order to avoid interference to existing operations. IPWireless supports our proposal prohibiting CPEs from transmitting unless a base station pilot is present. Moreover, IPWireless states that CPE transmissions must be restricted to locations where the blanket-license devices are operating under the active control and supervision of a licensed base station. We agree with IPWireless that handsets should not transmit unless a base station pilot is present, and that such transmissions must be restricted to locations under the active control and supervision of a licensed base station. Moreover, we believe that handsets should not transmit unless a base station pilot tone is present to preclude any unnecessary radiation "noise" in the spectrum. Accordingly, we will prohibit subscriber handsets from transmitting unless a base station pilot is present.

C. Eligibility Restrictions

1. ITFS Eligibility Restrictions

149. *Background.* The ITFS service was established to provide formal educational and cultural development in aural and visual form to students enrolled in accredited public and private

[260] *Id.*

[261] *Two-Way FNPRM*, 15 FCC Rcd at 14576.

[262] *Id.* at 14576-7 ¶¶ 39-40.

schools, colleges and universities.[263] Our current rules limit eligibility for the 114 megahertz of ITFS spectrum in the 2500-2690 MHz band to: (1) accredited educational institutions, (2) governmental organizations engaged in the formal education of enrolled students, and (3) nonprofit organizations whose purposes are organizational and include providing educational and educational television materials to accredited institutions and governmental organizations.[264]

150. In the *NPRM*, we included a detailed discussion and history demonstrating how, over a fifteen year period, the Commission has progressively relaxed the educational content obligations of ITFS licensees to accommodate the flexibility needs of ITFS providers who have increasingly relied on the leasing revenues provided by commercial spectrum users. As a result, the Commission's ITFS leasing policies now allow ITFS licensees to lease all but a small fraction of their capacity to commercial operators. From 1983 through 1998, the Commission progressively reduced the educational content required of ITFS licensees while expanding the opportunities for ITFS licensees to generate income by leasing out their channels, and substantially increased MDS operators' access to ITFS spectrum. These actions were taken in an effort to encourage more intensive use of the spectrum and to facilitate the generation of revenue for ITFS licensees.

151. In the *NPRM*, we stated that recent events warranted re-examination of the ITFS eligibility restrictions. We noted, for example, that in recent years, the Commission has pursued a general policy of eliminating use restrictions in radio licenses except in circumstances where there are clear and compelling reasons for retaining them.[265] We also noted the increased use of ITFS spectrum capacity by MDS systems as a result of the Commission's liberalization of leasing rules and relaxation of educational content requirements.[266] We also noted the increasing use of the Internet for educational purposes, which appeared to offer comparable and perhaps superior means of delivering educational programming.[267] Moreover, we expressed concern that retention of the ITFS eligibility restrictions could be detrimental to the growth of services on ITFS channels, because the complexity of the contractual relationships that our rules require in the ITFS service might discourage investment and impair the ability of service providers to modify their operations in response to changing technology and market conditions. We further noted that innovation could proceed more smoothly if commercial operators were able to aggregate spectrum in the 2500-2690 MHz band and purchase ITFS facilities, which would allow them to exercise direct ownership control. We suggested that providing existing ITFS licensees with greater flexibility might permit such licensees to capture the increased value of their spectrum, which would yield resources that could be used to enhance their educational programs in the manner that best suited their individual needs. In light of all these concerns, we sought comment on whether we should retain the ITFS eligibility restrictions. Additionally, we sought comment on maintaining ITFS as a separate service requiring educational programming but modifying the eligibility requirements to allow for-profit companies to be eligible licensees. Finally, we invited comment on whether we should eliminate or otherwise change our existing ITFS instructional content origination rules.

[263] 47 C.F.R. § 74.931(a)(1).

[264] *See* 47 C.F.R. § 74.932(a). Under certain circumstances, "wireless cable entities" may obtain access to ITFS channels so long as at least eight other ITFS channels remain available for future ITFS use. *See* 47 C.F.R. §§ 74.990-74.992. In the *FNPRM* portion of this document, we are seeking comment on whether we should retain this restriction. *See* section V.E , *supra.*

[265] *NPRM,* 18 FCC Rcd at 6769 ¶ 111.

[266] 47 C.F.R. § 74.931(d)(1).

[267] *NPRM,* 18 FCC Rcd at 6770 ¶ 114.

152. *Discussion.* After considerable deliberation, we conclude that it is in the public interest to retain EBS eligibility and content restrictions. We believe that the public interest favors preserving this spectrum for licensing to ITFS-eligible entities and that doing so will further the educational objectives that led to the establishment of ITFS. The record demonstrates that the EBS service provides critical educational services such as web-based and streaming video for instruction in adult literacy and basic skills, emergency medical and fire services, law enforcement, and corrections. These services are often provided by community colleges at a variety of locations across the state where such instruction would generally be unavailable.[268] The record also demonstrates that ITFS is used to provide training for citizens whose employment opportunities are limited by the closing of manufacturing plants and continued reduction in agricultural employment. Some EBS services, such as Mississippi Ednet's project with the Mississippi State Department of Health that will connect two hundred hospitals and health departments will even contribute to homeland security.[269]

153. Some commenters argue that important public interest objectives would be fulfilled if ITFS eligibility restrictions were eliminated. For example, BellSouth asserts that under a flexible use approach, licensees of ITFS spectrum may offer services other than fixed broadband and innovators can develop new, spectrally efficient technologies and offer new services in competition with fixed and portable operators.[270] BellSouth further asserts that open eligibility rules would facilitate development of Secondary Markets when DSL providers like it introduce advanced services to areas where wired DSL and cable modem services are not available, and provide facilities-based competition and competitive choice in areas where service is available.[271] Similarly, Network for Instructional Television (NITV) contends that open eligibility will stimulate private investment in new technologies that the education community has neither the budget nor the expertise to bring to the market unilaterally.[272]

154. We agree with BellSouth and NITV that these are all very important public interest objectives, and in particular, that leveraging the potential for wireless technology in the 2496-2690 MHz band to benefit education requires the private sector's investments and expertise. Nonetheless, we also believe that these goals can be attained notwithstanding existing eligibility restrictions. In this regard, we note that investment in the band is not solely dependent on an open eligibility scheme, and our restructuring of the band will go a long way towards encouraging the necessary investments. For example, as discussed earlier, the interleaved band plan has played a significant role in discouraging investment and hampering service. Inasmuch as licensees will now enjoy a band plan that provides contiguous spectrum, a significant obstacle to innovation in broadband deployment has now been rectified, and this enhancement alone will lead to significant changes in the utilization of this spectrum. Of particular importance is that the record does not demonstrate that commercial ownership of ITFS spectrum is a prerequisite to stimulating investment in the band. Indeed, as IMWED points out, that the bulk of commercial entities submitting comments to the *NPRM* did not take a position on ITFS eligibility demonstrates that lifting eligibility restrictions would not have a significant impact on commercial development of the band.[273] Moreover, over the course of this proceeding, several large commercial

[268] NCCCS Reply Comments at 2.

[269] Mississippi Ednet Reply Comments at 8-9.

[270] BellSouth Comments at 23.

[271] BellSouth Comments at 23-24.

[272] Network for Instructional Television (NITV) Reply Comments at 3-4.

[273] IMWED Reply Comments at 8.

providers such as Clearwire and Nextel have acquired rights to spectrum and developed plans to establish broadband services in this spectrum, even notwithstanding the possibility that ITFS eligibility restrictions would be retained.[274] Therefore, we are not convinced that innovation in the band will be stifled by the continued retention of ITFS eligibility restrictions.

155. A number of ITFS licensees, such as IIT, disagree with assertions made by some commenters that actual educational use of the ITFS band is minimal.[275] IIT states that there are active ITFS operations in all of the top 50 TV markets, its use is robust, and educational institutions have deployed these frequencies for their intended use.[276] Furthermore, IIT asserts that notwithstanding the five percent minimum capacity rule, the majority of ITFS licensees who lease excess capacity retain at least 20 hours per week per channel and regularly reserve at least 25% of "total" capacity for ITFS use.[277] The Catholic Television Network (CTN) and the National ITFS Association (NIA) likewise assert that many ITFS licensees reserve amounts greater than the requisite 5% for their own use, while some do not lease any capacity on their ITFS stations.[278] During the course of this proceeding, a number of EBS licensees have submitted filings or made ex parte presentations to the Commission detailing the robust and critical educational applications they deliver to the public via their EBS spectrum.[279]

156. We recognize that there are a number of ITFS licensees, including some major educational institutions, who use the band more intensively for educational purposes than the rules require, and than other ITFS licensees in general. Because these commenters represent a small proportion of actual ITFS licensees, we must also acknowledge that overall utilization of the EBS spectrum is not optimal at this time. Our records indicate that there are 2,760 active, unexpired EBS licenses and permits (including hub and booster stations), or an average of approximately fifty-five facilities in each state. Given the large number of ITFS licensees, the record does not demonstrate that the ITFS community as a whole is making extensive use of the 114 megahertz allocated to them for educational programming. Nonetheless, we are reluctant to penalize the ITFS licensees who make extensive use of this spectrum and find that such action would be inconsistent with our conclusions on the importance of ITFS to the educational mission. Moreover, we recognize that ITFS entities could legitimately argue that they should have an opportunity to operate under the rules we have adopted today. For years, the band has been plagued by instability, uncertainty, filing freezes and burdensome rules, all of which have played substantial roles in fostering uncertainty and stagnation in the band. Ending the ITFS service without having given licensees the benefit of a stable regulatory environment would neither be fair nor in the public interest. We believe the better approach, and one which has been long overdue, is to provide licensees with a stable regulatory scheme thereby providing them the opportunity for their operations to flourish. We are optimistic that the sweeping changes we make today will ultimately result in significant improvements in the utilization of ITFS spectrum. We encourage ITFS licensees to make the most of these improvements by efficiently utilizing this spectrum, and intend to monitor the progress in this

[274] Clearwire Ex Parte (filed May 28, 2004); Nextel Reply Comments at 4.

[275] IIT Comments at 5.

[276] IIT Comments at 8-9.

[277] IIT Comments at 10-11.

[278] CTN & NIA Comments at 10.

[279] *See, e.g.*, Huntsville City Schools Reply Comments at 1; Archdiocese of New York Comments at Attachment A; SBBC Comments at 2-5; IIT Comments at 5-8; ITFS Parties Comments at Appendix.

spectrum by means of the Bureau's periodic transition reports.[280]

157. In a related matter, we agree with CTN and NIA's argument that trends such as increased leasing of ITFS capacity to commercial entities do not justify eliminating ITFS eligibility restrictions.[281] As these commenters correctly point out, EBS is the only spectrum specifically set aside by the Commission for use by educators.[282] Furthermore, it is well established that revenue from leasing to commercial interests has, in many instances, effectively funded and financed ITFS buildout and operations. The Commission has always considered the leasing of excess capacity a legitimate source of funding for the educational mission, and has taken numerous steps over the years to facilitate and encourage these secondary market transactions.[283]

158. We recognize that educational programming is now available over the Internet, and the public is increasingly using the Internet to receive college courses or services of for-profit corporations that provide educational programming.[284] Indeed, the internet offers interesting educational possibilities in light of the fact that its ability to deliver media-rich content is improving rapidly.[285] In response to this data, some ITFS providers such as IIT, state the nature and quality of Internet education programming, which includes streamed-video windows typically covering only a quarter of the PC screen, is vastly different from ITFS programming, which includes full motion video of the instructor, screens of detailed materials, demonstrations in video, graphics and animation in real-time.[286] IIT and other ITFS licensees ultimately concede that the Internet offers interesting potential as an alternate delivery means, but stand firm in their belief that the time for internet conversion has not yet or may never arrive. As time progresses, we expect that many ITFS services will convert to internet or other low-power cellular means of delivery. However, regardless of whether the internet can technologically replace ITFS operations at this time, we agree with IIT and other ITFS commenters who assert that administrative issues such as planning and infrastructure purchases preclude a complete shift from ITFS as the primary mode of delivery at this time.[287] Moreover, other commenters point out that the Internet is an adjunct to, as opposed to a replacement for, their ITFS operations.[288] Inasmuch as relying on internet or other low-power conversion to deliver ITFS services at this time could result in the immediate immobilization of critical ITFS programming, we find it is not in the public interest to remove eligibility restrictions in reliance on internet replacement of ITFS at this time.

159. We recognize that our decision today may, at the outset, appear to digress from the Commission's policy goal, as expressed in the Spectrum Policy Statement, of eliminating eligibility

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[280] See para. 103, *supra*.

[281] CTN & NTIA Comments at 8.

[282] CTN & NTIA Comments at 3-4.

[283] *See NPRM*, 18 FCC Rcd at 6765-68 ¶¶ 108-109.

[284] Jared Bleak, *Educated by the Market: A Researcher's Look at Educational Entrepreneurialism* (Harvard Graduate School of Education, Oct. 5, 2001) http://www.gse.harvard.edu/news/features/market10052001.html).

[285] *Id.*

[286] IIT Comments at 13.

[287] IIT Comments at 15.

[288] *See* GMUIF Reply Comments at 3; IIT Comments at 13-15.

restrictions. However, we believe that a public interest exception to our general trend is warranted in the instant case. Of particular importance is the fact that ITFS is the only spectrum specifically reserved for educators. In an open market, we are concerned that educators could not effectively compete against broader commercial interests. Indeed, pursuant to an open eligibility scheme, the inability to bid against commercial operators for this spectrum would effectively deny educators any future entry strategy into the band. This reality, coupled with the importance of ITFS to the educational mission, creates a strong justification for retaining eligibility restrictions in the ITFS band.

160. Additionally, we believe that the objectives accomplished by eliminating eligibility restrictions can still be attained notwithstanding ITFS eligibility restrictions. In this connection, we note that the Commission's trend towards eliminating eligibility restrictions is driven by its general belief that market forces should generally be allowed to operate without being restricted by government because they will tend to push the use of radio licenses to their highest valued applications.[289] Here, we reject the view that the Commission's public interest goal of moving spectrum to its highest-valued use conflicts with the goal of promoting education. We believe that our actions today will instead promote both goals because the restrictions on eligibility here will not impede market forces. That is, our ITFS leasing and secondary market rules for spectrum leasing arrangements are sufficiently flexible to allow market forces to push the ITFS spectrum towards its highest valued use, and educators will continue to enjoy considerable flexibility to lease their excess capacity spectrum. Further, educators can enter into partnerships with commercial interests to improve the capacity and efficiency of their systems, which in turn could free up more spectrum for commercial operators to work towards the development of ubiquitous broadband.

161. In the *NPRM*, we expressed concern that the complexity of the contractual relationships that our current ITFS rules require may discourage investment and impair the ability of service providers to modify their operations in response to changing technology and market conditions.[290] We noted, for example, that an MDS operator who wants to change from providing one-way, high-powered television transmission operations from a single tower to providing two-way Internet access from multiple low-powered base stations must gain the consent of the ITFS operators in the market, even though the MDS operator may already have a leasing agreement with the ITFS licensee. While we must acknowledge that regulatory hurdles to innovation generally remain a prime concern, we do not believe that the eligibility rules will hinder the development of the band. Indeed, the additional flexibility we have provided with respect to spectrum leasing, and the other steps we have taken herein to maximize flexibility, should allow ITFS licensees to develop innovative educational systems and enter into partnerships with commercial carriers.

162. We agree with commenters that ITFS licensees who do not wish to use their facilities should be limited to selling their facilities to other educational organizations or non-profit educational organizations.[291] Although some commenters expressed concern that retaining eligibility restrictions would result in having spectrum lie fallow, as previously indicated, we believe that the sweeping changes made herein will promote the full utilization of the spectrum. Of particular concern to the Commission is the fact that open eligibility would mean that educational institutions and not-for-profit educational organizations that are interested in obtaining licenses will have to compete with a broader range of entities, including for-profit corporations, for future access to spectrum in the band. The challenges that

[289] *2000 Spectrum Policy Statement*, 15 FCC Rcd at 24178.

[290] *NPRM*, 18 FCC Rcd at 6770 ¶ 115.

[291] *See* IMWED Reply Comments at 6-7; CTN & NIA Reply Comments at 6; SBBC Reply Comments at 2.

educational institutions and organizations would face in obtaining access to the remaining ITFS white space would have been likely to serve as permanent barriers to their ability to acquire spectrum in this band.

163. In the *NPRM*, we sought comment on maintaining ITFS as a separate service requiring educational programming but modifying the eligibility requirements to allow for-profit companies to be eligible licensees. We noted, for example, that one possible change could be to apply to ITFS channels public interest obligations comparable to those that apply to DBS under Section 100.5 of our rules.[292] NTCA favors this approach, asserting that commercial operators should be permitted to acquire the spectrum, meet any educational requirements and use the excess capacity to meet the needs of the rural consumers.[293] Similarly, NITV urges that the Commission require that 5% of the capacity of a digital system be made available by commercial ITFS spectrum holders free to non-profit educational organizations and institutions for use in fulfilling their educational mission. With the exception of these two commenters, however, other commenters generally did not express interest in this approach. Rather, the comments largely focused on whether for-profit companies should be eligible licensees generally. Furthermore, in an ex parte presentation, ITFS licensees expressed their belief that it was in the best interest of education for educators to actually retain control of their ITFS spectrum. The lack of support for this approach generally coupled with the fact that this model already exists in the context of DBS persuades us that this approach is neither desirable nor necessary.

164. We take this opportunity to rename the Instructional Television Fixed Service as the Educational Broadband Service. In light of the fact that the service is not limited to either video or fixed services, we believe that it is appropriate to update the name of the service. While we understand that video-based services will continue to operate in the new EBS, we believe that the EBS name better describes the contemplated future use of the band. The change in the name of the service does not affect the substantive rights of current ITFS licensees, permittees, and applicants.

2. MDS/ITFS Cross Ownership Restrictions

165. *Background.* Section 613 of the Communications Act forbids cable operators from holding a MMDS license in any portion of the franchise area served by that cable operator's cable system. In the *NPRM*, the Commission sought comment on how Section 613's cable cross-ownership restriction applies to broadband internet access service, particularly in light of the legislative history of Section 613 and the fundamental change to the nature of MDS service caused when MDS licensees were permitted to construct systems capable of providing such broadband service.[294] We asked whether allowing cable operators to acquire MDS/ITFS licenses would have a significant effect on concentration in video markets,[295] and also whether allowing cable operators or DSL providers to acquire MDS/ITFS spectrum

[292] DBS operators must reserve four percent of their channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature. *See* 47 C.F.R. § 100.5.

[293] NTCA Comments at 4.

[294] *See NPRM*, 18 FCC Rcd at 6776 ¶ 126. The *NPRM* also sought comment concerning mobile phone service, another non-video service that potentially may be provided using MDS/ITFS spectrum. *Id.*

[295] *Id.* at 6774-76 ¶¶ 122-126. The *NPRM* also deemed it unlikely that cable operators would acquire MDT/ITFS licenses in order to foreclose entry by a wireless MVPD provider and observed that new MDS licensees are "very unlikely" to be entrants into the MVPD markets, particularly since MDS video providers have penetrated very few markets. *Id.* at 6774-75 ¶ 122.

would have a negative impact on broadband internet markets.[296] We also sought comment on our preliminary conclusion that broadband markets are "very highly concentrated," and requested comment to the contrary.[297]

166. In 1990, the Commission sought comment on whether it should prohibit or limit licensing or leasing of MDS and ITFS channels by a cable system within its franchised area.[298] The Commission determined that the issue required evaluation of the relative merits of two "mutually exclusive" benefits—cable systems' ability to expand service, particularly into less populated areas, and potential competitors' ability to provide significant competition to incumbent cable systems.[299] The Commission concluded that although the enhancement of existing multi-channel services was a significant and desirable benefit, a greater benefit was to be found in the introduction of competition to then-existing multi-channel services (essentially, incumbent cable systems).[300] Accordingly, based on its observation that wireless cable service ranked among the "most imminent" sources of competition to incumbent cable systems, the Commission decided to generally prohibit a cable operator, either directly or indirectly, from acquiring a license (either through an application for a new station, assignment of a license, or transfer of control) or lease for an MDS station whose PSA overlaps its franchise area, or a lease for use of an ITFS station whose transmitter was within 20 miles of any part of its franchise area, unless there was another cable system in that franchise area operating in a substantial portion of the PSA of the proposed MDS station.[301]

167. The 1990 cable cross-ownership restrictions contained an exemption that allowed cable operators to acquire MDS spectrum in rural areas that would otherwise remain unserved by wireless cable.[302] The rural exemption was modeled after the cable/telco cross-ownership prohibition, which the Commission expected to "speed the introduction of multichannel service to customers in sparsely populated areas without appreciably reducing realistic and desired opportunities for wireless cable operators to introduce service competitive with existing cable service."[303] The *1990 R&O* also grandfathered existing cable/wireless operations and contracts, rather than forcing divestiture, on the ground that divestiture would be a hardship to cable operators and their customers and would be

[296] *Id.* at 6774-76 ¶¶ 123, 126.

[297] *Id.*

[298] *See 1990 R&O*, 5 FCC Rcd at 6417 ¶ 42. Before 1990 the Commission permitted cable systems to operate MDS (and OFS) channels within their franchise areas. *See id.* at 6416 ¶ 41.

[299] *Id.* at 6417 ¶ 42.

[300] *Id.* In the early 1990s, the MVPD market differed greatly from that market today. For example, in 1993, cable services accounted for nearly 100% of the MVPD market while DBS service was launched for the first time that same year. In contrast, as of 2003, DBS services accounted for 21.6% of the MVPD market nationwide while MDS services accounted for a mere 1.3%. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172, 19 FCC Rcd 1606 ¶¶ 4, 5 & 16 (rel. Jan. 28, 2004) (*Tenth MVPD Report*).

[301] *1990 R&O*, 5 FCC Rcd at 6417 ¶ 42.

[302] The application process adopted for cable operators provided that otherwise acceptable cable system applications for MDS channels would be put on public notice for 30 days and could be granted provided no non-cable party filed an application. *Id.* at 6417 ¶ 43. The Commission also sought comment on how to define a local programming exception to the 1990 restrictions. *1991 R&O*, 6 FCC Rcd at 6799 ¶ 34.

[303] *Id.* at 6799 ¶ 37.

unnecessary given the limited number of systems operated by cable companies.[304] Finally, the *1990 R&O* created a local programming exception to the licensing and leasing prohibitions of Sections 21.912 and 74.931(e), and created a "limited exception" to the 1990 prohibitions for "MDS and ITFS channels used in the delivery to multiple cable headends or locally produced programming, that is, programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area."[305] Under this exception, which the Commission expected to permit and promote an additional outlet for locally originated programming, a cable operator was permitted "one MDS channel, or its equivalent in ITFS excess capacity, in an MDS PSA."[306] This local programming exception, together with the restrictions on that exception, also applied to leases executed to facilitate the provision of local programming.[307] If local programming was terminated, any MDS license granted under the exception was to be automatically forfeited on the day after the local programming was discontinued.[308]

168. In 1992, Section 613(a)'s restrictions on cable cross-ownership were enacted as part of legislation that generally directed the Commission to set "horizontal" limits on cable operators' scale (i.e., the number of cable subscribers an operator could reach through its cable systems, or systems in which it had an attributable interest) and "vertical" limits on cable operators' integration with video programmers (i.e., suppliers of video programs to be carried over the cable operators' systems).[309] In 1993, the Commission determined that its 1990 cable cross-ownership rules, albeit with some modification, "effectively implement[ed]" the cable cross-ownership restrictions of Section 613(a).[310] Those preexisting rules generally prohibited cable systems that are the sole providers in their franchise areas from holding MDS licenses and from leasing time on MDS or ITFS stations within their franchise areas.[311] The *1993*

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[304] *Id.* at 6799 ¶ 39. The Commission also grandfathered, on equitable grounds, cable applications for MDS channels filed before February 8, 1990, as well as lease agreements between cable and MDS or ITFS entities for which a lease or a firm and enforceable agreement was signed prior to the same date. *Id.*

[305] *Id.* at 6800 ¶ 41.

[306] *Id.* In applying for an MDS channel, a cable operator was required to provide the proposed local programming within one year. *Id.*

[307] *Id.*

[308] *Id.*

[309] *See, e.g.*, Time Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1128 (D.C. Circuit 2001), reh'g and reh'g en banc denied, May 4, 2001. *Time Warner* rejected restrictions the Commission, imposed pursuant to Section 613(f)(1) of the 1992 Cable Act, which was codified as 47 U.S.C. § 533(f)(1), in part on the ground that the Commission failed to show a non-conjectural harm to competition that was prevented by such restrictions. *Time Warner*, 240 F.3d at 1133-1136 ("Congress also sought to 'ensure that cable operators continue to expand, where economically justified, their capacity,'...and it specifically directed the FCC, in setting the ownership limit, to take into account the 'efficiencies and other benefits that might be gained through increased ownership or control.'") (quoting 1992 Cable Act, § 2(b)(3)).

[310] *See* In the Matter of Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-Trafficking Provisions, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 6828, 6842 ¶ 101 (1993) *(1993 Cable R&O)*.

[311] Section 613 was added to the Act by Section 11(a) of the Cable Television Consumer Protection and Competition Act 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). *See 1993 Cable R&O*, 8 FCC Rcd at 6841-44 ¶¶ 92-112. The rules in existence when Section 613 was enacted had been promulgated in proceedings that began in (continued....)

Cable R&O sought to allow cable operators greater flexibility in providing MDS in unserved portions of their franchise areas by prohibiting cable/MDS cross-ownership only if a cable operator's actual service area overlapped with the MDS PSA.[312] This was more lenient than the 1990 rules, which prohibited cable cross-ownership throughout the franchise area and the MDS protected area if there was any overlap between the two.[313]

169. In the decade following the *1993 Cable R&O*, MDS service initially gained market share but then peaked in mid-1998, with MDS representing only 1.3% of the MVPD market.[314] In January 2004, we observed that the wireless cable industry provides competition to the cable industry in only limited areas and that subscribership to MDS has been steadily declining over the last several years, notwithstanding that the deployment and use of MDS services (together with large dish satellite services) has contributed significantly to the early acceptance of non-wireline alternatives to traditional MVPD service.[315] While cable served almost 100% of the nation's MVPD subscribers in 1993, in 2003, that share had fallen to approximately 75%, with DBS providing the most significant competitive alternative with a 21.6% share of the national MVPD market.[316]

170. In 1998, the Commission released the *Two-Way Order* permitting MDS/ITFS licensees to construct digital two-way Internet service via cellularized communication systems.[317] As a result, MDS/ITFS licensees began to turn away from offering video service and began to focus on data delivery service.[318] In the *NPRM*, we observed that the typical broadband internet market is highly concentrated.[319] Despite this concentration, we noted that in some circumstances there could be substantial benefits to allowing the incumbent cable or DSL operator to have more access to MDS/ITFS spectrum.[320] We noted that such cable or DSL operator access may benefit rural areas where expensive upgrades to cable or DSL plants were not feasible.[321] We sought comment as to whether allowing incumbent cable operators and/or DSL providers to be eligible to obtain MDS/ITFS licenses could have a negative impact on some broadband interest markets.

171. *Discussion.* Section 613(a) of the Act states:[322]

(Continued from previous page)
1990. *See 1991 R&O*, 6 FCC Rcd at 6799 ¶ *34* (summarizing *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990)).

[312] *1993 Cable R&O*, 8 FCC Rcd at 6843 ¶ 103.

[313] *See Tenth MVPD Report,* 19 FCC Rcd at 1672-73 ¶ 103.

[314] *See id.* at 1613-16 ¶ 16.

[315] *Id.* at 1610 ¶ 9.

[316] *Id.* at 1608-9, 1613-16 ¶¶ 4 (cable market share), 5 (DBS growth after 1988 initial authorization and 1993 service initiation) & 16 (DBS market share).

[317] *Two-Way FNPRM*, 13 FCC Rcd at 19112.

[318] *Tenth MVPD Report*, 19 FCC Rcd at 1663-64 ¶ 86.

[319] *NPRM*, 18 FCC Rcd at 6774-76 ¶¶ 123-125.

[320] *Id.* at 6775-76 ¶ 125.

[321] *Id.*

[322] 47 U.S.C. § 553(a).

> It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system.
>
> The Commission may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming.[323]

172. The purposes behind the cable/MMDS cross-ownership restrictions were to address a concern "that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public" and to prevent a cable operator from warehousing potential competition.[324] Since channels in the new BRS and EBS bands may continue to be used for video distribution, these concerns are still potentially relevant in the BRS/EBS band. Moreover, since MMDS licensees will become licensees in the BRS/EBS band, we do not believe that it would be consistent with Congressional intent to allow cable operators to hold BRS/EBS licenses for the purpose of distributing multichannel video service. Accordingly, subject to the present exceptions in our rules, we will continue to prohibit cable operators from holding BRS/EBS licenses and using those licenses to offer multichannel video programming service.

173. On the other hand, we do not believe that the statute requires us to prohibit cable

[323] 47 U.S.C. § 553(a)(2).

[324] *1993 Cable R&O*, 8 FCC Rcd at 6841 ¶¶ 92-94.

[345] Earthlink Comments at 15-16.

operators from holding BRS/ITFS licenses for the purpose of providing broadband data services or voice. We conclude that Section 613(a) does not apply to broadband services. The Commission did not allow MMDS licensees to provide such services until the Digital Declaratory Ruling was released in 1996, which was four years after the statute was enacted. Today, we create a new radio service designed to allow licensees to offer services that were not even contemplated when the statute was passed. We do not see any basis in the statutory language or legislative history for interpreting the statute so as to prohibit cable operators from providing services that did not exist when the prohibition was enacted. We note that Earthlink argues that Section 613 bars cable operators from acquiring MDS spectrum to offer non-video services, and that waiving Section 613's restrictions for cable operators would thwart broadband competition.[345] We reject that argument because the statute was clearly designed to address competition in the multi-channel video programming market, not broadband competition. We also reject as speculative and unsupported Earthlink's argument that Section 613 was left in place when Congress passed the 1996 Act because that provision is necessary to prevent the anti-competitive effects that would occur if a cable operator were able to purchase or control alternative facilities that a competitor might use to compete with the incumbent cable operator.[346]

174. With respect to DSL providers, there is no statutory prohibition similar to Section 613 that would require us to consider cross-ownership restrictions and, in any event, ILECs already have access to MDS/ITFS spectrum and this existing eligibility has caused no apparent problems. We also reject as inapposite Earthlink's argument that Section 652 of the Act, which prohibits cross-ownership of an ILEC and a cable television system, should be interpreted to support a general ban on common ownership of alternative broadband facilities.[347] Nothing in Section 652 addresses eligibility restrictions on radio spectrum.

175. Despite these bases for declining to impose cross-ownership restrictions on broadband services, Earthlink, Teton and NAF favor imposing such restrictions, arguing that the high broadband internet market share that cable operators and DSL providers enjoy gives those parties the incentive to acquire BRS/ITFS spectrum in order to thwart competition in that market.[348] When assessing the need to restrict the opportunity of any class of service provider to obtain spectrum for the provision of communications services, our overall goal has been to determine whether the restriction is necessary to ensure that consumers will receive communications services in a spectrum-efficient manner and at reasonable prices. Under our precedent, eligibility restrictions are imposed only when (1) there is a significant likelihood of substantial competitive harm in specific markets, and (2) eligibility restrictions will be effective in addressing such harm. Under this standard, the Commission relies on market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary.[349] Those in favor of restricting the eligibility of cable operators and DSL providers to acquire BRS/ITFS licenses have not shown that this standard is met. They have not cited

[346] Earthlink Comments at 16-17.

[347] Earthlink Comments at 17.

[348] *See* Earthlink Comments at 17; Teton Comments at 6-7 ("... Teton believes that the Commission should refrain from opening eligibility for MDS spectrum to cable and DSL interests. At a minimum, the Commission should retain the cable/MDS cross ownership restrictions in rural markets where DSL and cable have a virtual lock on the broadband market."); Teton Reply Comments at 14 (same); NAF Reply Comments at 35 ("In the absence of cross-ownership limits, cable and LEC competitors will simply acquire rights in competing spectrum, blocking access to competitors.").

[349] *NPRM,* 18 FCC Rcd at 6773, ¶ 121.

relevant market facts and circumstances sufficient to demonstrate that the eligibility of such service providers is likely to result in substantial competitive harm or that, even if specific markets experienced harm to competition, the eligibility restrictions they advocate would be effective in eliminating that harm.[350]

176. We conclude therefore that cable operators and ILECs alike should be allowed to acquire or lease BRS/ITFS spectrum in order to provide non-video services like broadband internet access. In light of Section 613(a)'s language and context we do, however, prohibit cable operators from acquiring BRS/ITFS licenses outright for the purpose of providing MVPD service. We also retain the related ban on cable operators leasing BRS/ITFS spectrum within their franchise areas for the purpose of providing MVPD service, but allow leasing for other purposes.

3. Leasing and Secondary Markets

177. In 2003, we took significant steps to facilitate the development of Secondary Markets in spectrum usage rights involving our wireless radio services when we adopted our *Secondary Markets Report and Order* and *Further Notice of Proposed Rulemaking*.[356] In the *Report and Order*, we established policies and rules to enable spectrum users to gain access to licensed spectrum by entering into different types of spectrum leasing arrangements with licensees in most wireless radio services.[357] In addition, we streamlined the Commission's approval procedures for license assignments and transfers of control in most wireless radio services.[358] In the *Further Notice*, we proposed several additional steps we could take to facilitate the development of these Secondary Markets.[359] We also sought comment on

[350] *See NPRM*, 18 FCC Rcd at 6773-74, ¶ 121.

[356] *See generally* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Secondary Markets Report and Order* and *Further Notice*, respectively) Erratum, 18 FCC Rcd 24817 (2003).

[357] *See generally Report and Order*, 18 FCC Rcd at 20607-82 ¶¶ 1-194.

[358] *See generally id.* at 20682-85 ¶¶ 195-203.

[359] *See generally Secondary Markets Further Notice*, 18 FCC Rcd at 20687-20719 ¶¶ 213-323.

whether the spectrum leasing policies should be extended to, inter alia, MDS and ITFS.[360] Given that we are undertaking a comprehensive examination of the rules relating to these services in this *Report and Order*, and given the close relationship between the leasing rules and other issues raised in this proceeding, we will address in this *Report and Order* the question raised in the *FNPRM* of whether the rules adopted in the *Secondary Markets Report and Order* should apply to the BRS/EBS spectrum.

178. Commenters generally supported extending the spectrum leasing policies adopted in the *Report and Order* to ITFS and MDS leasing.[361] Commenters also recommended grandfathering existing leasing arrangements that have evolved under the distinct leasing model historically applicable to ITFS.[362] NIA/CTN also argue that the substantive requirements currently applicable to ITFS leasing should continue to apply to leases entered into under the Secondary Markets spectrum leasing framework.[363]

179. We agree with the commenters that we should extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum. In the *Secondary Markets Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. These flexible policies continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country. Facilitating the development of these Secondary Markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services, and enable development of additional and innovative services in rural areas.[364] We agree with the commenters that there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of these rules and policies. We also agree with WCA that extending those rules and policies to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services.[365]

180. We also agree with commenters that existing leases entered into under our existing ITFS leasing framework should be grandfathered, so long as the leases remain in effect and are not materially changed. We agree with NIA/CTN that it would be unduly burdensome to force licensees that wish to have their existing leases remain in effect to renegotiate those leases to comply with our Secondary Markets policies and rules.[366] Specifically, although our Secondary Market rules limit spectrum leasing arrangements to the length of the license term, we will allow pre-existing ITFS leases to remain in effect

[360] *Id.* at 20708-16 ¶¶ 288-314.

[361] *See* BellSouth Comments at 6-10; NIA/CTN Comments at 1-9 and Reply Comments at 1-3; SBC Comments at 12-13; Spectrum Market LLC Comments at 4-5; Sprint Comments at 4-6; WCA Comments at 1-8. Unless otherwise noted, all comments cited in this section were filed in WT Docket No. 00-230.

[362] WCA Comments at 6-7, NIA/CTN Comments at 7-8.

[363] NIA/CTN Comments at 5-6.

[364] *See generally Secondary Markets Report and Order,* 18 FCC Rcd at 20607 ¶ 2.

[365] WCA Comments at 7.

[366] NIA/CTN Comments at 7.

for up to fifteen years, consistent with our current rules.[367] With respect to future spectrum leasing arrangements entered into pursuant to our Part 27 rules for EBS, however, consistent with our treatment of other services, we believe it is appropriate to limit the spectrum lease term to the length of the license term in question.

181. In addition, we agree with NIA/CTN that the substantive use requirements that have historically applied to ITFS must remain in effect in the spectrum leasing context.[368] NIA/CTN describes the "most significant" limitations as: "(i) there must be certain minimum educational uses of ITFS spectrum (typically, a minimum of 20 hours per 6 MHz channel per week); (ii) for analog facilities, there must be a right to recapture an additional amount of capacity for educational purposes (typically, 20 more hours per channel per week); for digital facilities, the licensee must reserve at least 5% of its transmission capacity for educational purposes; (iii) the lease term may not exceed 15 years; (iv) the ITFS licensee must retain responsibility for compliance with FCC rules regarding station construction and operation; (v) only the ITFS licensee can file FCC applications for modifications to its station's facilities; and (vi) the ITFS licensee must retain some right to acquire the ITFS transmission equipment, or comparable equipment, upon termination of the lease agreement."[369] As NIA/CTN notes, the purpose behind these limitations was to maintain the traditional educational purposes of ITFS.[370] We believe that the continued application of these substantial use limitations, as well as the retention of ITFS eligibility requirements in Section C, will facilitate the traditional educational purposes of ITFS. Accordingly, we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our prior leasing policy and retaining EBS substantive use requirements.

D. Standardization of Practices and Procedures

1. Consolidation of Procedural Rules in Part 1

182. *Background.* In the ULS *R&O*, the Commission consolidated the majority of its wireless services procedural rules into Part 1.[371] By consolidating the procedural rules in Part 1, the Commission improved the consistency of its rules across wireless services and provided a single point of reference for applicants, licensees, and members of the public seeking information regarding our licensing procedures.[372] Additionally, the consolidation reduced confusion among applicants and licensees, accelerated the application process, and improved the speed with which wireless carriers were able to provide service to the public.[373] Because consolidation of procedural rules into Part 1 has proven beneficial to other wireless services, in the *NPRM*, we sought comment on consolidating the MDS and

[367] *See id.* at 8.

[368] *Id.* at 5-6.

[369] *Id.* at 4.

[370] *Id.*

[371] Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, 21054 ¶ 56 (1998) (*ULS R&O*). *See NPRM*, 18 FCC Rcd at 6787 ¶ 159.

[372] *See id.*

[373] *See id.*

ITFS procedural rules into Part 1 of the Commission's Rules.[374]

183. *Discussion.* After reviewing the comments we received on this issue, we conclude that we will consolidate the BRS and EBS procedural rules into Subpart F of Part 1 of the Commission's Rules,[375] which contains the rules applicable to the processing of applications for all services in the Universal Licensing System. We agree with commenters that this action will decrease confusion concerning the application of our BRS and EBS rules. For example, the Coalition recognizes that the Commission's Wireless Telecommunications Bureau (WTB) has efficiently processed applications under Subpart F of Part 1 of the Commission's Rules and believes that, with appropriate consideration of the particular needs of MDS and ITFS, Part 1 can be modified to provide for the licensing of MDS and ITFS facilities without undue impact on processing systems.[376] Likewise, Bell South supports standardizing filing requirements and transition to new forms and processing rules through consolidating procedural rules into Part 1 like the majority of wireless services.[377] OWTC also approves of a consolidation of the MDS and ITFS application procedures and explains that since regulation of the MDS service was transferred from the former Mass Media Bureau to WTB (and from BLS to ULS), it is logical to consolidate the MDS procedural rules into Part 1 as is done in the majority of wireless services.[378] Similarly, Teton is in favor of the Commission merging MDS and ITFS into a single MDS/ITFS spectrum with streamlined processing rules.[379] Accordingly, in consolidating the BRS and EBS procedural rules into Subpart F of Part 1 of the Commission's Rules, we adopt rules that benefit applicants, licensees and members of the public, by streamlining our processing rules as discussed in the sections that follow. By this action, we also realize a key policy objective in this rulemaking, which is simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

2. Consolidation of Service Specific Rules in Part 27

184. *Background.* In the *NPRM*,[380] we noted that our MDS and ITFS service specific rules are currently contained in three rule parts - Parts 21, 73 and 74.[381] Part 21 contains our MDS rules while Parts 73 and 74 contain our ITFS rules. Although MDS and ITFS licensees use their licenses to provide similar services, our rules treat these licensees differently. For example, with regard to modifications, a major modification in MDS is currently triggered by, among other things, a change in the geographic coordinates of a station's transmitting antenna of more than ten seconds of latitude or longitude or both, or any change which increases the antenna height by three meters or more.[382] In contrast, a major change to an ITFS Station is triggered by, among other things, relocating a facility's transmitter site by 10 miles or

[374] *See id.* at 6786 at ¶ 159.

[375] *See* 47 C.F.R. § 1. 901 *et seq.*

[376] *See* Coalition Comments at 135.

[377] *See* BellSouth Comments at 13-14 n.21; OWTC Comments at 6.

[378] *See* OWTC Comments at 6.

[379] *See* Teton Comments at 15-16.

[380] *See NPRM*, 18 FCC Rcd at 6786 ¶ 160.

[381] *See* 47 C.F.R. §§ 21.1 *et seq.*, 73.1 *et seq.*, and 74.1 *et seq.*

[382] *See* 47 C.F.R. § 21.23.

more, or increasing the transmitting antenna height by 25 feet or more.[383]

185. In the *NPRM*, we stated that we believe that regulatory parity will lead to efficiency in this band and spur the development of new and improved services for the public. Additionally, we stated that consolidating the MDS and ITFS service specific rules into one rule part will reduce confusion and provide a single reference point for these similar services. Because we believe that consolidation will benefit applicants, licensees and members of the public, we proposed to consolidate the MDS and ITFS service specific rules into Part 101. However, we also sought comment on alternative means of consolidating the rules relating to these services, such as incorporating the rules into Parts 21 or 27 of our Rules.[384]

186. *Discussion.* After careful consideration of the comments we received on this issue, we conclude that consolidating the service specific rules for BRS and EBS into Part 27 of the Commission's Rules is the most sensible approach given the flexible use and geographically-licensed service areas that are at the heart of our Part 27 rules.[385] As an initial matter, the licensing plan and service rules we adopt today are consistent with the fundamental goals established in the Commission's November 1999 Spectrum Policy Statement, which includes promoting greater efficiency in spectrum markets.[386] The Commission therein recognized that where appropriate, greater efficiency can be achieved through flexibility, which can be permitted through the use of relaxed service rules.[387] Regarding the encouragement of emerging telecommunications technologies, the Commission also recognized that there are substantial public interest benefits to harmonizing the rules applicable to like services including efficiency in spectrum markets and regulatory neutrality, which help create a level playing field across technologies and thereby promote more effective competition. The Commission in the 1999 Spectrum Policy Statement also observed that such a structure would permit reliance on the marketplace to achieve the highest-valued use of the spectrum, thereby ensuring that the Commission and its processes do not become a bottleneck in bringing new radio communications services and technologies to the public.[388]

187. We believe there are substantial public interest benefits to harmonizing rules applicable to like services, which is best accomplished by placing the service specific rules for BRS/EBS in Part 27 of the Commission's Rules. The Coalition asserts that the MDS and ITFS services should be regulated

[383] *See* 47 C.F.R. § 74.911(b).

[384] *See id.*

[385] *See* 47 C.F.R. § 27.1 *et seq.* In explaining the Part 27 objectives, the Commission stated that "we believe that a flexible licensing approach will allow licensees the freedom to determine the services to be offered and the technologies to be used in providing those services. This flexibility will better enable licensees to use their assigned frequencies in response to market forces...In light of these considerations, we believe that the general application of our Part 27 licensing and operating rules will promote flexible and efficient use of the unpaired 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands and the paired 1392-1395 MHz and 1432-1435 MHz bands. We agree with the commenters that application of our Part 27 rules will provide licensees a streamlined licensing framework that will foster innovation, flexible use and regulatory certainty." Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands, WT Docket No. 02-8, RM-9267, RM-9692, RM-9797, RM-9854, RM-9882, *Report and Order*, 17 FCC Rcd 9980, 9988 ¶¶ 10-11 (2002) (*27 MHz R&O*) (footnotes omitted).

[386] *See 1999 Spectrum Policy Statement*, 14 FCC Rcd at 19870-71 ¶ 9.

[387] *See id.*

[388] *See id.*

pursuant to Part 27 of the Commission's Rules, which the Commission originally created for the Wireless Communications Service ("WCS") and has since applied to other flexible use, geographically licensed wireless services.[389] Likewise, EarthLink supports discarding the Commission's broadcast-style regulatory model for MDS and ITFS and supports switching to a Part 27-like regulatory scheme.[390] Consistent with our determinations with respect to other wireless services, the BRS/EBS spectrum's regulatory structure assumes that consumer benefits will be maximized if BRS/EBS licensees are able to take advantage of the flexible use standard in Part 27. We believe that applying the flexible use standard in Part 27 to BRS and EBS licensees will enable licensees to construct and operate facilities within their GSAs with the least amount of regulation.[391]

188. We note that BellSouth supported the proposal in the *NPRM* to consolidate service-specific rules into Part 101, but did not voice any opposition to placing the service specific rules in Part 27.[392] On the other hand, OWTC prefers to keep the service rules for MDS, ITFS and other fixed wireless services separate. OWTC believes that while consolidation of procedural rules is sensible and could lead to a streamlining of application and other procedures, the service rules for each unique service must be clear and unambiguous in order to prevent licensee and market confusion.[393]

189. However, we agree with the Coalition that Part 101 is not best suited for the BRS and EBS service specific rules. Part 101 of the Commission's rules generally was not created for the flexible use, wide-area services that BRS and EBS services will be authorized to provide as the BRS/EBS spectrum.[394] Furthermore, we note that the Commission created Part 101 to simplify and conform the rules for point-to-point, Part 21 common carrier and Part 94 private operational fixed microwave services,[395] in recognition of the fact that those services shared many of the same frequency bands, used substantially the same equipment and had converged their technical standards over time.[396] In so doing, the Commission specifically excluded MDS and ITFS from Part 101, noting that "[t]he ITFS and MDS services differ from the services to be included in Part 101 in terms of policy considerations, applicable rules, and technical standards."[397] We concur with the Coalition that to the extent that the regulatory

[389] *See* Coalition Comments at 132-133.

[390] *See* EarthLink Comments at 7.

[391] *See 27 MHz R&O*, 17 FCC Rcd at 9988 ¶¶ 9-10; *see also supra* n.385.

[392] *See* BellSouth Comments at 13-14 n.21.

[393] *See* OWTC Comments at 7. We do note that OWTC proposed an alternative approach to create consolidated service rules for similar aspects of the respective unique services, but then have distinct service rule subparts when the historical service rules diverge from each other for each unique service.

[394] *See* 47 C.F.R. 101.1 *et seq.* "[W]e find that a flexible, market-based approach is the most appropriate method for determining services rules in [the Upper 700 MHz Band]....To comport with the range of potential service applications on these bands, and our intended use of Part 27 as a basic regulatory framework for service rules governing other bands, we have also recast the structure of the Part 27 rules to reflect their revised scope." In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476, 478 ¶ 2 (2000) (footnotes omitted) (*Upper 700 MHz First R&O*).

[395] *See* 47 C.F.R. §§ 21.1 *et. seq.* and 90.1 *et. seq.*

[396] *See* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Notice of Proposed Rulemaking*, 10 FCC Rcd 2508, 2509 ¶ 2 (1994) (*Part 101 NPRM*).

[397] *Id.*, 10 FCC Rcd at 2509 n. 4 (1994).

regimes applicable to MDS and ITFS have changed, they have moved further away from those imposed on the typical Part 101 service.[398]

190. While it is true that the Commission regulates LMDS licensees under Part 101 and LMDS has some similarities to BRS, the decision to regulate LMDS pursuant to Part 101 predated the creation of Part 27, and the Commission has since recognized that Part 27 is better suited for flexible use services.[399] Although geographically licensed wireless services in the 24 GHz and 39 GHz bands are also regulated under Part 101, this is attributable to the fact that licensees in those bands were regulated under Part 101 prior to the Commission's adoption of geographic licensing rules for such services.[400] Accordingly, we adopt service specific rules for BRS and EBS in Part 27 of the Commission's Rules, thereby providing a single reference point for these similar services, as opposed to having the rules for these services in three different rule parts. This streamlining will benefit applicants, licensees and the public by promoting innovation and maximizing flexibility in the service rules.

3. Standardization of Major and Minor Filing Requirements:

191. *Background.* MDS licensees currently submit FCC Forms 304 or 331 to modify their licenses pursuant to Sections 21.40 and 21.41 of our Rules.[401] The Commission will not grant a "major modification" to an MDS station unless it finds that the modification is in the public interest and in compliance with Communications Act.[402] A major modification to an MDS license includes amendments that require submission of an environmental assessment, result in a substantial and material alteration of the proposed service, specify a substantial change in beneficial ownership or control, or is deemed substantial by the Commission pursuant to section 309 of the Communication Act.[403]

192. In contrast, EBS licensees currently file a formal application on FCC Form 330 for any

[398] *See* WCA Comments at 134. *See also* discussion of regulatory fees in *FNPRM* at V.D, *infra.*

[399] *See, e.g.,* Amendment to Parts 2, 15 and 97 of the Commission's Rules To Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, *Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking*, 13 FCC Rcd 16947, 16969-70 ¶ 54 (1998) ("While the Commission has adopted service rules for LMDS in Part 101 of the Commission's Rules, the Commission has also adopted a new set of service rules, in Part 27 of the Commission's Rules, for wireless services in the 2.3 GHz band. These rules provide a licensing framework that may be more appropriate than the Part 101 rules in that they provide for much greater flexibility in the types of services that can be provided and in the technical and operational rules that govern those services.") (footnotes omitted).

[400] *See generally* Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service, *Order,* 12 FCC Rcd 3471, 3476 ¶ 13 (1997); *39 GHz R&O*, 12 FCC Rcd at 18637 ¶ 77 (1997).

[401] 47 C.F.R. §§ 21.40, 21.41.

[402] *See* 47 C.F.R. § 21.40. A major modification for an MDS license includes a substantial modification of the engineering proposal such as (but not limited to) a change in, or addition of, a radio frequency channel; a change in polarization of the transmitted signal; a change in type of transmitter emission or an increase in emission bandwidth of more than ten percent; a change in the geographic coordinates of a station's transmitting antenna of more than ten seconds of latitude or longitude or both; any change which increases the antenna height by three meters or more; any technical change that would increase the effective radiated power in any direction by more than 1.5 dB; or any changes or combination of changes that would cause harmful electrical interference to an authorized facility or result in a mutually exclusive conflict with another pending application. 47 C.F.R. § 21.23.

[403] *Id.*

of the following kinds of changes or modifications to its transmission system: adding a new channel; changing channels; changing polarization; increasing the EIRP in any direction by more than 1.5 dB; increasing the transmitting height by twenty-five feet or more; or relocating a facility's transmitter site by ten miles or more.[404] Our current rules further provide that applications for "major changes" to existing EBS facilities that are mutually exclusive with other such applications or with applications for new stations are subject to competitive bidding.[405] EBS minor modification applications may be filed at any time and are not be subject to competitive bidding.[406] Subject to Commission approval, our existing rules also permit certain parties to involuntarily modify the facilities of an existing EBS licensee in certain situations.[407]

193. In sharp contrast to the policies described above, the Commission has adopted one streamlined set of modification rules for services license using ULS.[408] Under ULS, we treat all major modifications as new applications.[409] Licensees may make minor modifications as a matter of right without prior Commission approval (other than pro forma assignments and transfers) within thirty days of implementing such changes.[410] Where other rule parts permit licensees to make permissive changes to technical parameters without notifying the Commission (e.g., adding, modifying, or deleting internal sites), no notification is required when making a modification pursuant to the ULS rules.[411] This consolidation of modification rules has led to efficient processing of modification applications in ULS. Therefore, noting that the license modification rules for MDS and ITFS are currently spread across seven rules, we sought comment in the *NPRM* on consolidating these modification rules in one rule part.[412] In this connection, we proposed to consolidate the modification rules to determine major and minor modifications for MDS and ITFS licenses using the ULS Rules in Part 1 of the Commission's Rules.[413]

194. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that there are substantial benefits to employing the simplified approach we use in ULS to govern modifications for BRS/EBS licensees. BellSouth supports the proposed new rules regarding standardizing filing requirements.[414] IMLC supports the Commission's proposals to eliminate the various unnecessary and unhelpful filings which MDS licensees must make, stating that outdated and unnecessary reports and requirements for MDS licensees should be abolished.[415] The Coalition believes that minor revisions to

[404] 47 C.F.R. § 74.951.

[405] 47 C.F.R. § 73.5000. We note that our rules permit ITFS licensees to exchange channels evenly with each other or with MDS licensees after filing pro forma applications. 47 C.F.R. § 74.902(f).

[406] Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920 ¶ 207 (1998).

[407] *See* 47 C.F.R. § 74.986.

[408] *See* 47 C.F.R. § 1.929.

[409] *See* 47 C.F.R. § 1.947.

[410] *See* 47 C.F.R. § 1.929.

[411] *See* 47 C.F.R. § 1.947(b).

[412] *See NPRM*, 18 FCC Rcd at 6786 ¶ 160.

[413] *See NPRM*, 18 FCC Rcd at 6786 ¶¶ 161-163; *see also* 47 C.F.R. § 1.901 *et. seq.*

[414] *See* BellSouth Comments at 13-14 n.21.

[415] *See* IMLC Comments at iii, 8.

Section 1.929 are required to reflect the MBS Licensing Scheme and that with the development of appropriate individual standards for determining whether MBS filings are "major" or "minor," Section 1.929 can readily be amended to consolidate the MDS and ITFS major and minor change and major and minor amendment rules.[416]

195. We believe that using our Part 1 ULS modification rules for BRS and EBS modifications will simplify the licensing process by removing obsolete or unnecessary regulatory burdens and that no special rules are required for modifications to the MBS as suggested by the Coalition. The Coalition's belief that special modifications are required pursuant to Section 1.929 of our rules is premised on the assumption that we would employ site-based licensing for the MBS. However, inasmuch as we have adopted geographic area licensing for the entire band, including the MBS,[417] we need not adopt the modifications proposed by the Coalition.[418]

196. Employing the Part 1 ULS approach, as described above, for modifications to BRS and EBS licenses will reduce confusion regarding the appropriate rules to follow, increase the speed with which the Commission staff processes applications and will eliminate redundancy in our rules. Accordingly, today we adopt rules that consolidate the modification rules to determine major and minor modifications for BRS and EBS licenses under our ULS Part 1 modification rules. Consequently, at the end of the six month transition period to ULS, implementation of mandatory electronic filing will begin for BRS and EBS licensees.[419] MDS licensees currently submitting FCC Forms 304 or 331 to modify their licenses and EBS licensees currently submitting FCC Form 330 must begin using FCC Form 601 to report modifications to the Commission.[420]

4. Amendments to New and Modification Applications

[416] *See* Coalition Comments at 134 – 137. The Coalition states that minor revisions to Section 1.929 are required to reflect the MBS Licensing Scheme. With the development of appropriate individual standards for determining whether MBS filings are "major" or "minor," Section 1.929 can readily be amended to consolidate the MDS and ITFS major and minor change and major and minor amendment rules. The common "major changes" standards set forth in Section 1.929(a) would seem to be appropriately applied to ITFS and MDS applications, whether for the LBS/UBS or the MBS. WCA states, however, that additional "major changes" must be defined for applications for the MBS channels, so as to assure that the FCC and potentially-affected MDS and ITFS licensees will have a fair opportunity to evaluate the possibility of interference from proposed modifications or from amendments to pending applications. More specifically, the Coalition Proposal suggests that the Commission define as "major" for the MBS any application, or an amendment to pending application, that proposes any of the following: (i) any change in frequency; (ii) any change in polarization; (iii) any increase in height of the C/R of the transmitting antenna by more than 8 meters (26 feet); (iv) any relocation of the station by more than 1.6 km (1 mile); (v) any change in the frequency offset of an analog station (however, an analog station upgrading from no frequency offset to any specific frequency offset (minus, zero or plus) would not be deemed a major change); (vi) any increase in occupied bandwidth; or (vii) any change to the transmission system that results in an increase in EIRP of more than 1.5 dB in any direction. *Id.*

[417] *See* discussion of geographic area licensing at Section IV.A.4, *supra.*

[418] *See* n.416, *supra.*

[419] Once our new BRS/EBS rules become effective, there will be a six-month transition period after which before electronic filing in ULS mandatory for these services. *See* discussion of transition period to ULS electronic filing at Section IV.D.17 , *infra.*

[420] *See* discussion of FCC Forms at paras. 254-258, *infra.*

197. *Background.* In the *NPRM* we sought comment on whether we should adopt the consolidated wireless procedures under Part 1 of the Commission's rules for amendments to applications.[421] Generally, pursuant to this consolidated approach for processing wireless applications, applicants may file amendments to pending applications as a matter of right if we have not designated the application for hearing or listed it in a competitive bidding public notice as accepted for filing.[422] Likewise, where an amendment to an application constitutes a "major change" as defined in Section 1.929, we treat the amendment as a new application for determination of filing date, public notice, and petition to deny purposes.[423] Furthermore, under the consolidated wireless approach, where an amendment to an application specifies a substantial change in beneficial ownership or control (de jure or de facto) of an applicant, the applicant must provide an exhibit with the amended application containing an affirmative, factual showing as set forth in Section 1.948(h)(2).[424]

198. Our consolidated wireless procedures for amendments to wireless applications differ in some respects from our current approach to amendments for MDS and ITFS applications.[425] For example, ITFS applicants currently may amend applications to cure defects noted in deficiency letters to the applicant. MDS BTA applicants currently may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice. MDS operators have recommended that we revise our rules to use the same definitions for major and minor amendments as for major and minor modifications.[426]

199. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that we will adopt the consolidated wireless procedures, contained in Part 1 of the Commission's Rules, for amendments to BRS and EBS applications. Consequently, at the end of the transition period to

[421] *See NPRM*, 18 FCC Rcd at 6786 ¶ 164.

[422] *See* 47 C.F.R. § 1.927.

[423] *See* 47 C.F.R. § 1.927(h).

[424] *See* 47 C.F.R. § 1.927(g).

[425] Our existing rules treat certain amendments as new applications that receive a new filing date as of the date the applicant submits the amendment. Amendments that we treat as new applications include applications submitted up to fourteen days after the application appeared as accepted on public notice that reflect any change in the technical specifications of the proposed facility; applications submitted with a new or modified analysis of potential interference to another facility; or applications submitted with an interference consent statement from a neighboring licensee. 47 C.F.R. § 21, 23. In such cases, the amended application must include an applicant certification that it has met all requirements regarding interference protection to existing and prior proposed facilities, and that it has obtained any necessary consent letters in lieu of interference protection. The applicant must also certify that it has served all potentially affected parties with copies of its amended application and engineering materials, and that the engineering analyses comply with the rules and methodology. *See* 47 C.F.R. §§ 21.23, 73.3522(a). Furthermore, ITFS applicants may amend applications to cure defects noted in deficiency letters to the applicant. *See* 47 C.F.R. § 73.3522(a). MDS BTA applicants may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice. *See* 47 C.F.R. § 21.926. In both services, applicants may not amend applications if the proposed amendment seeks more than a pro forma change of ownership or control.

[426] *See, e.g.*, IMLC Comments at iii, 8.

mandatory electronic filing under ULS,[427] BRS and EBS licensees will use FCC Form 601 to amend their applications.[428] This is yet another step in achieving a key policy objective in this rulemaking by simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

5. Assignments of Authorization and Transfers of Control:

200. *Background.* In the *NPRM* we sought comment on proposing to revise our MDS and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules.[429] Currently, our MDS licensees use FCC Form 305 to apply for voluntary and involuntary assignments, pro forma assignments, and FCC Form 306 to apply for voluntary transfers of control and pro forma transfers of control.[430] These licensees use FCC Form 304A to request a partial assignment.[431] However, the assignor must apply for deletion of the assigned facilities, indicating concurrence in an assignee's request.[432] The parties must consummate these transactions within forty-five days from the date of approval.[433] If the parties fail to consummate a partial assignment, the parties must submit FCC Form 304A to return the assignor's license to its original condition.[434] Before the Commission will consent to these transactions, the assignor/transferor must complete construction of the facility and file a certificate of completion of construction.[435]

201. Our current rules require the assignor/transferor to file the certificate of construction within one year from the initial license grant date, the consummation date of the transaction; or median date of the applicable commencement dates if the transaction involves a system of two or more stations. Our current rules also require an assignee/transferee to file FCC Form 430 License Qualification Report with the appropriate application form (Form 305 or Form 306) unless the assignee or transferee already has a current and substantially accurate report on file with the Commission. Finally, the parties of both transactions must notify the Commission of the date of consummation, by letter, within ten days of the

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[427] At the adoption of this order a six-month transition period will begin after before requiring mandatory electronic filing by MDS and ITFS applicants and licensees in ULS. *See* discussion of transition period to ULS electronic filing at Section IV.D.17 *infra*.

[428] *See* discussion of FCC forms at paras. 254-258 *infra*.

[429] *See NPRM,* 18 FCC Rcd at 6789-90 ¶¶ 165-170; *see also* 47 C.F.R. § 1.948.

[430] *See* 47 C.F.R. § 21.11(d) (Assignment of License); 47 C.F.R. § 21.11(e) (Transfer of control of corporation holding a conditional license or license); 47 C.F.R. § 21.13 (General Application Requirements); 47 C.F.R. § 21.15 (Technical Content of Applications); 47 C.F.R. § 21.17 (Certification of Financial Qualifications); 47 C.F.R. § 21.19 (Waiver of Rules); 47 C.F.R. § 21.38 (Assignment or Transfer of Station Authorizations); 47 C.F.R. § 21.39 (Considerations Involving Transfer or Assignment Applications); 47 C.F.R. § 21.912 (Cable Television Eligibility Requirements and MDS/Cable Cross Ownership); 47 U.S.C. § 310 (Limitation on Holding and Transfer of Licenses (Alien Ownership Restriction).

[431] 47 C.F.R. § 21.11(e).

[432] *Id.*

[433] *Id.*

[434] *Id.*

[435] *See* 47 C.F.R. § 21.934. We note that exceptions exist if there is not a substantial change in ownership or control of the authorized facility from the transaction (assignment/transfer); involuntary transaction due to the licensee's bankruptcy, death, or legal disability; and if the transaction involves BTA authorizations. *See id.*

date of consummation.

202. In contrast, ITFS licensees presently use Form 330 to request an assignment of license or a transfer of control.[436] With both types of transactions, ITFS licensees must file their applications at least forty-five days before the contemplated effective date of the transaction.[437] However, in the case of an involuntary transaction, the Commission must be notified in writing, promptly after the death or legal disability of a licensee.[438] Additionally, an application for involuntary transaction must be filed within thirty days of such occurrence.[439]

203. Recognizing, however that there would be significant benefits to eliminating inconsistencies between similar services, the Commission developed FCC Form 603 to process assignment of license and transfer of control applications in ULS. Specifically, the Commission found that replacing service specific forms with consolidated forms would provide the public with a consistent set of procedures and filing requirements and would increase the speed and accuracy of the assignment and transfer process.[440]

204. In the *NPRM*, we sought comment on proposing to revise our MDS and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules.[441] Specifically, we proposed to eliminate the prior consent requirement for non-substantial, pro forma assignments in MDS, and extend the consummation notice period to 180 days for both services. [442] With regard to involuntary assignments, we proposed to integrate the MDS rules into our ULS consolidated rules. [443] Additionally, we proposed to revise our channel exchange procedures[444] to conform to our assignment of license procedures.[445] For example, our rules currently require both the filing of a major modification application to change a frequency assignment[446] and each licensee seeking to exchange channels must file separate pro forma assignment applications.[447] We found that this channel exchange procedure places an undue burden upon licensees and the Commission's resources.[448] As a result, we

[436] *See* 47 C.F.R. §§ 74.910, 73.3500.

[437] *See* 47 C.F.R. § 73.3540.

[438] *See* 47 C.F.R. § 73.3541.

[439] *Id.*

[440] *ULS R&O*, 13 FCC Rcd at 21079 ¶ 113.

[441] *See NPRM*, 18 FCC Rcd at 6789-91 ¶¶ 165-170.

[442] *See id.* at 6791 ¶ 169.

[443] *See id.*

[444] This procedure is burdensome in that it requires our engineers to generate and to enter a minor modification application into BLS for each channel that the parties seek to exchange. *See* 47 C.F.R. §§ 21.901(d), 74.902(f), 74.951(e).

[445] *See NPRM*, 18 FCC Rcd at 6791 ¶ 170.

[446] *See* 47 C.F.R. § 74.951(e).

[447] *See* 47 C.F.R. § 74.902; *see also* 47 C.F.R. § 21.901.

[448] The MDS and ITFS community has also asked that we make changes in this area. *See* Coalition Proposal at Appendix B n.49.

proposed instead to require the licensees involved to treat channel exchanges like any other set of license transfers, i.e., to file two or more applications showing the transferor and transferee for each channel or set of channels being transferred.[449]

205. *Discussion.* We conclude that there are substantial benefits to revising our MDS and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules for BRS/EBS licensees. AMLC and IMLC point out that many transactions cannot be consummated in the 45 days presently allowed.[450] The Rural Commenters believe the Section 21.38 requirement for prior Commission approval of pro forma assignments of license and transfers of control can be eliminated. [451]

206. We generally agree with these commenters and conclude that we will adopt our proposals regarding BRS and EBS transaction requirements as discussed above. Although there are some differences in the information requirements for transfers and assignments, we believe there is a sufficient degree of overlap in the information that both types of applicants supply that both BRS and EBS applicants can use the FCC Form 603 for transfers and assignments. Furthermore, the Commission designed Form 603 so that applicants only have to answer the questions pertinent to the type of transaction involved.[452] Consequently, at the end of the transition period to ULS implementation, BRS and EBS licensees will use FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers.[453] Accordingly, we adopt transaction rules for BRS and EBS that conform to and merge with the ULS requirements in Section 1.948 of our rules. Streamlining the filing requirements for transaction requirements for BRS and EBS is another milestone in reaching the goal of simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

6. Partitioning and Disaggregation

207. Background. In the *NPRM* we proposed allowing partitioning and disaggregation of spectrum for ITFS auction winners.[454] We noted that in other services where we have implemented

[449] *See NPRM,* 18 FCC Rcd at 6791 ¶ 170.

[450] AHMLC Comments at 7; IMLC Comments at 10. We do note, however, that the ITFS Parties are fundamentally opposed to changing the eligibility standards for ITFS station licenses, either for parties applying for new licenses, or for parties seeking to acquire existing licenses. While the ITFS Parties support the Coalition Proposal, they also believe that allowing for-profit, commercial entities to become licensees would likely result in the ultimate destruction of the ITFS service as an educational asset. For this reason, the ITFS Parties also support the Joint Comments of CTN and NIA on this issue as well. *See* ITFS Parties Comments at 3-4.

[451] *See* Rural Commenters Comments at 6.

[452] *Id.*

[453] *See* 47 C.F.R. § 1.948; *see also* discussion of FCC forms at ¶¶ 254-258 *infra*.

[454] *See NPRM,* 18 FCC Rcd at 6791-92 ¶¶ 171, 172. Additionally, we also sought comment in the *NPRM* on factors other than geography or frequency that licensees might reasonably use when disaggregating their licenses. For example, the *Spectrum Policy Report* discusses the possibility that licensees might also be willing to sell off parts of their license rights on the basis of time slots and power levels. That report suggests that frequency-agile transceivers are already capable of sensing if a given channel is in use at a particular moment in time, by switching channels, reducing power, or remaining silent until a channel becomes available. *See Spectrum Policy Report* at 19.

geographic area licensing,[455] we have allowed licensees to partition their service areas and to disaggregate their spectrum.[456] For example, our current rules allow MDS BTA licensees to partition their spectrum.[457]

208. In the *NPRM*, we explained that if we allowed partitioning and disaggregation of geographic area licenses of current ITFS channels, licensees could file for partial assignment of a license, and licensees could apply to partition their licensed GSAs or disaggregate their licensed spectrum at any time following grant of their geographic area license.[458] We proposed that the area to be partitioned would be defined by the partitioner and partitionee. We also proposed that the partitionee or disaggregate would be authorized to hold its license for the remainder of the partitioner's or disaggregator's license term, and would be eligible for renewal expectancy on the same basis as other licensees. There would be no restriction on the amount of spectrum disaggregated and we would permit combined partitioning and disaggregation. Licensees that partition and disaggregate would be subject to provisions against unjust enrichment. We also proposed to eliminate any separate provisions relating to "channel swapping" and rely upon the ability of licensees to partition and disaggregate their spectrum.[459]

209. *Discussion.* After reviewing the comments, we conclude that partitioning and disaggregation should be permitted for both ITFS and MDS licensees. The Coalition and BellSouth support this proposal.[460] Similarly, Ericsson supports the proposal because it allows the market to devise spectrum configurations that meet the needs of industry. Ericsson further asserts that freely operating market forces would ensure the diversity of services offered to consumers, the adequacy of spectrum for flexible uses, and the ability of small business to provide niche services. In particular, Ericsson encourages the Commission to permit aggregation of rural and urban service areas, which would lead to service areas that permit nationwide coverage. Ericsson believes that aggregation of service areas is especially important for ensuring that development of AWS in this band is not hampered, especially in rural areas. Ericsson asserts that the ability to aggregate licenses or disaggregate service areas (i.e., to permit spectrum trading) would allow for a tailored service area without sacrificing less populated ones.[461] OWTC, believes the Commission should develop a minimal GSA and allow licensees to aggregate multiple service areas on a regional and/or a national basis. OWTC states that under this approach, smaller entities with local or regional business plans and little interest in providing large-area service would not be discriminated against.[462]

210. We agree with these commenters and believe the same logic applies to allowing partitioning and disaggregation for EBS licensees as presently applies to partitioning of MDS BTA spectrum under our current rules. Allowing partitioning and disaggregation of BRS/EBS licenses will

[455] *See, e.g.*, 47 C.F.R. §§ 27.15, 101.535, 101.1111, 101.1323.

[456] "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries. "Disaggregation" is the assignment of discrete portions of "blocks" of spectrum licensed to a geographic area licensee or qualifying entity.

[457] 47 C.F.R. § 21.931.

[458] *See NPRM*, 18 FCC Rcd at 6791-2 ¶ 171.

[459] *See, e.g.*, 47 C.F.R. §§ 21.901, 74.902.

[460] *See* Coalition Proposal at 13; BellSouth Comments at 13-14 n.21.

[461] *See* Ericsson Comments at 6-7.

[462] *See* OWTC Comments at 4.

provide flexibility to licensees, promote efficient spectrum use, and facilitate market entry by small businesses, educational, telemedicine or medical institutions, or other parties who may lack the financial resources for participation in BRS/EBS auctions. Accordingly, we permit partitioning and disaggregation of licenses for all services in the band.

7. License Renewal

211. *Background.* In the *NPRM* we sought comment on our proposal to eliminate reinstatement procedures and adopt the late-filed renewal policy for wireless radio services for MDS and ITFS.[463] Additionally, we sought comment on whether we should impose any special requirements or limitations on the renewal of ITFS licenses.

212. Pursuant to the Commission's Rules, MDS licensees must file FCC Form 405 to renew their licenses thirty and sixty days before the expiration of such license. [464] If the renewal application is not timely filed, a licensee shall automatically forfeits its license without *Further Notice* to the licensee upon the expiration of the license period specified therein.[465] An MDS licensee may seek reinstatement of its licenses by filing a petition within 30 days of the license's expiration explaining the failure to timely file the required notification or application and setting out with specificity the procedures that the petitioner has established to ensure that such filings will be submitted on time in the future.[466] Generally, a license period is ten years. The terms of MDS station licenses granted on the basis of underlying BTA service area authorizations obtained by competitive bidding extend until the end of the ten-year BTA authorization.[467]

213. In contrast, ITFS licensees must file FCC Form 330-R to renew a license.[468] Unless otherwise directed by the FCC, ITFS licensees must file their renewal applications no later than the first day of the fourth full month prior to the expiration date of the license to be renewed.[469] The Commission will reinstate expired ITFS licensees if the former licensee files a timely petition with adequate justification.[470]

214. In further contrast, licensees in auctionable services file FCC Form 601 no later than the expiration date of the authorization for which renewal is sought, and no sooner than ninety days prior to expiration. The Commission designed ULS to provide wireless licensees with a pre-expiration notification approximately ninety days before their licenses expire and thereby avoid situations in which

[463] *See NPRM*, 18 FCC Rcd at 6792-93 ¶¶ 173-177.

[464] *See* 47 C.F.R. § 21.11(c).

[465] *See* 47 C.F.R. § 21.44(a)(2).

[466] *See* 47 C.F.R. § 21.43(b).

[467] *See* 47 C.F.R. § 21.929(b).

[468] *See* Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 7 FCC Rcd 18365 (2002).

[469] *See* 47 C.F.R. § 73.3539.

[470] *See, e.g* Renewal Applications of Jonsson Communications Corp., DA 02-3099, *Memorandum Opinion and Order*, 17 FCC Rcd 22697, 22698 (2002). There is no codified rule specifically addressing reinstatement of ITFS licenses.

licensees allow their licenses to expire inadvertently and subsequently seek reinstatement.[471] We note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license.

215. In 1999, the Commission adopted a new policy regarding treatment of late-filed renewal applications in the Wireless Radio Services.[472] Renewal applications that are filed up to thirty days after the expiration date of the license are granted nunc pro tunc if the application is otherwise sufficient under our Rules.[473] However, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.[474] Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license nunc pro tunc, but such requests are not routinely granted, and are subject to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures.[475] In determining whether to grant a late-filed renewal application, the Commission takes into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[476] After the license expiration, the previous licensee may file a new application for use of those frequencies subject to any service specific rules. Once that thirty-day period has elapsed, or the prior holder of the license files a new application for that spectrum, the license then becomes available for the Commission to reassign by competitive bidding or other means according to the rules of the particular service.[477]

216. *Discussion.* After reviewing the comments we received on this issue, we conclude that we will adopt the late-filed renewal policy utilized for wireless radio services for the BRS/EBS band. The Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services is as follows: Renewal applications that are filed up to thirty days after the expiration date of the license will be granted nunc pro tunc[478] if the application is otherwise sufficient under our rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.[479] Applicants who file renewal applications more than thirty days after the license expiration date may also request that the license be renewed nunc pro tunc, but such requests will not be routinely granted, will be subject to stricter review,

[471] *ULS R&O*, 13 FCC Rcd at 21071 ¶ 96.

[472] *See* Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476, 11485 ¶ 22 (1999) (*ULS MO&O*).

[473] *See id.* at 11485 ¶ 22.

[474] *Id.*

[475] *Id.*

[476] *Id.* at 11485-6 ¶ 22.

[477] *See* Rules and Regulations to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, 63 Fed. Reg. 68904, 68908 (1998).

[478] *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.

[479] *See ULS MO&O*, 14 FCC Rcd at 11486 ¶ 22.

and also may be accompanied by enforcement action, including more significant fines or forfeitures.[480] In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[481]

217. As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application.[482] Even when a licensee asserts that no renewal notification regarding the license expiration was received, this reason provides no basis for the relief requested, because a licensee's obligation to file a timely renewal is not dependent on the Commission sending a renewal notice.[483]

218. We have previously held that an inadvertent failure to renew a license in a timely manner is not so unique or unusual to warrant a waiver of the rules.[484] The Commission will grant a waiver if (a) it is in the public interest and the underlying purpose of the rule would be frustrated or not served by application to the present case, or (b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.[485] Even in the case of public safety licensees, the Commission has determined that a licensee will not be afforded special consideration when the licensee fails to file a timely renewal application simply because it engages in activities relating to public health or safety.[486]

219. Bell South supports the proposed new rules regarding license renewal policies.[487] The Coalition asserts that the Commission should apply this policy to MDS and ITFS on a prospective basis

[480] *See id.*

[481] *See id.* at 11485 ¶ 22.

[482] *See ULS MO&O*, 14 FCC Rcd at 11485 ¶ 21. *See also* Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188, 191 ¶ 6 (WTB PSPWD 2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, 15 FCC Rcd 24547, 24551 ¶ 10 (WTB PSPWD 2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of license application in a timely manner"); World Learning, *Order*, 15 FCC Rcd 23871, 23872 ¶ 4 (WTB PSPWD 2000) (holding that licensee "is solely responsible for filing a timely renewal application"); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693, 19696 ¶ 8 (WTB PSPWD 2000) (*Berryville*) (holding that "it is the responsibility of each licensee to renew its application prior to the expiration date of the license"); Montana Power Company, *Order*, 14 FCC Rcd 21114, 21115 ¶ 7 (WTB PSPWD 1999) (holding that "it is the responsibility of each licensee to apply to renew its license prior to the license's expiration date").

[483] *See Berryville*, 15 FCC Rcd at 19693 ¶ 8 (citing *ULS R&O*, 13 FCC Rcd 21027, (1998) (holding that a "licensee's obligation to timely file a renewal application is not dependent upon the Commission sending a renewal notice to the licensee, rather it is the responsibility of each licensee to renew its application prior to the expiration date of the license")).

[484] *See* Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000) (citing Plumas-Sierra Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572, 5575 ¶ 9 (2000)).

[485] *See* 47 C.F.R. § 1.925(b)(3).

[486] *See* Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Report and Order*, 6 FCC Rcd 7297, 7301 ¶ 20 (1991).

[487] BellSouth Comments at 13-14 n.21.

only, and note that until recently, the Commission has consistently applied a lenient standard to late-filed Part 74 renewals. The Coalition further asserts that the new renewal policy should not be applied retroactively to late-filed renewal applications for licenses that expire prior to the effective date of the new rules.[488] OWTC supports the Commission's proposal to provide MDS licensees with a 90-day pre-expiration notice for renewal applications in order to avoid an inadvertent lapse of a license and the subsequent reinstatement effort. OWTC believes the pre-expiration notice is essential because the Commission proposes to eliminate the process of applying for reinstatement of the license if the expiration date passes without a proper renewal being filed.[489] Finally, Grand Wireless argues for a distinction between licensee/operators servicing the public and those who are not.[490]

220. We conclude that elimination of the reinstatement period will benefit all licensees in the band and other entities interested in acquiring abandoned spectrum.[491] Pursuant to the Commission's ULS procedures, failure to file for renewal of the license before the end of the license term results in automatic cancellation of the license.[492] We believe that eliminating reinstatement of expired licenses is prudent because ULS will send licensees a notification that their licenses are about to expire and, therefore, should be responsible for submitting timely renewal applications. Additionally, interactive electronic filing will make it easier for all licensees to timely file renewal applications. Moreover, we believe elimination of the reinstatement procedures will facilitate our ability to efficiently, and quickly perform our licensing responsibilities by reducing the amount of late-filed renewal applications that must be manually processed and by eliminating the processing of reinstatement applications. Accordingly, we eliminate our current reinstatement procedures and adopt the late-filed renewal policy for BRS and EBS on a prospective basis. We acknowledge that our previous handling of these matters was considerably lenient. We emphasize, however, that these new procedures will be strictly enforced, and licensees should take note accordingly.

8. Special Temporary Authority

221. *Background.* In the *NPRM*, we sought comment on our proposal to include MDS and ITFS special temporary authority (STA) requests under the same ULS regulatory regime as other Wireless Services.[493] Currently, for MDS, in circumstances requiring immediate or temporary use of facilities, entities may request special temporary authority to install and/or operate new or modified equipment.[494] Requests may be submitted as informal applications, at least ten days prior to the date of the proposed construction or operation (however, in practice an FCC Form 304 is attached to the informal request).[495] We may grant STAs without regard to the thirty-day public notice requirement in certain instances. First, we may grant an STA when the STA period is not to exceed thirty days and the filing of an application to

[488] WCA Comments at 137-139.

[489] OWTC Comments at 6. As discussed in ¶ 214, *supra* , we note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license.

[490] Grand Wireless Comments at 13.

[491] *ULS R&O*, 13 FCC Rcd at 21071 ¶ 96. The Commission excluded Commercial Radio Operators Licenses and Amateur licenses from this policy. *Id.*

[492] *Id.*

[493] *See NPRM*, 18 FCC Rcd at 6794-95 ¶¶ 178-180.

[494] *See* 47 C.F.R. § 21.25.

[495] 47 C.F.R. § 21.5.

change the STA into a permanent situation is not contemplated. Second, we may grant an STA when the STA period is not to exceed sixty days, pending the filing of an application to change the special situation into a regular operation. Third, we may grant an STA to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized. Fourth, we may grant an STA when there are extraordinary circumstances requiring operation in the public interest. We may grant STAs and extensions of STAs up to 180 days pursuant to Section 309(f) of the Communications Act[496] where extraordinary circumstances so require, but the licensee has a heavy burden to show it warrants such action. Finally, in times of national emergency or war, we may grant special temporary licenses (in place of construction permits, station licenses, modifications or renewals) for the period of the emergency.[497]

222. Under our existing rules, we may grant ITFS STAs in extraordinary circumstances requiring emergency operation to serve the public interest.[498] As in MDS, only an informal application is required. However, ITFS STA applicants must submit the request at least ten days before the date of the proposed operation. Pursuant to Section 309(f) of the Act,[499] We may grant ITFS STAs for a period not to exceed 180 days with a limited number of extensions also granted for up to 180 days.

223. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that we will adopt our proposal to include BRS and EBS STA requests under the same ULS regulatory regime as other Wireless Services. Bell South supports the proposed new rules regarding special temporary authority and there were no commenters opposed to adopting this approach.[500] Under the streamlined consolidated ULS approach, applicants must file STA requests electronically on an FCC Form 601 within ten days before the date of the proposed operation (although we may grant requests received less than ten days prior to operation) for compelling reasons).[501] Furthermore, because MDS STA requests are informal applications, but in practice have an FCC Form 304 attached, adoption of the Form 601 for BRS and EBS STA requests as currently used in WTB makes good sense. Inasmuch as STAs are an emergency measure, mandatory electronic filing as now required in WTB, would provide BRS and EBS licensees with quick, responsive service.[502] Accordingly, for the foregoing reasons, we adopt rules that include BRS and EBS STA requests under the same ULS regulatory regime as the Wireless Services. This action furthers our goals of simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

9. Ownership Information

224. *Background.* Currently MDS and ITFS licensees file FCC Form 430 to submit ownership information to the Commission. The Communications Act mandates the ownership

[496] 47 U.S.C. § 309(f).

[497] *Id.*

[498] *See* 47 C.F.R. § 73.3542; *see also* 47 C.F.R. §§ 73.1635, 74.910.

[499] 47 U.S.C. § 309(f).

[500] BellSouth Comments at 13-14 n.21. We also note that SCETV is concerned about the loss of Special Temporary Authority (STA) in several key geographical locations. *See* SCETV Comments at 7.

[501] *See* 47 C.F.R. § 1.931; *see also* Section IV.D.16, *infra* (discussion of FCC Forms).

[502] *See* 47 C.F.R. § 1.931.

information requested in Form 430.[503] The Form 430 requires the licensee to list its MDS and/or ITFS licenses or conditional licenses. Submission of ownership information enables the Commission to review whether applicants and licensees comply with our real-party-in-interest rules, eligibility for treatment as a small business at auction and foreign ownership restrictions.[504] In the *NPRM* we sought comment on whether MDS and/or ITFS licenses or conditional licenses should be required to submit ownership information on FCC Form 430. Noting that other wireless licensees use Form 602 to file ownership information electronically in ULS,[505] and that FCC Forms 602 and 430 request the same ownership information,[506] we proposed to require MDS and ITFS licensees to file Form 602, instead of Form 430, to submit ownership information.[507]

225. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that we will adopt our proposal to require BRS and EBS licensees to file Form 602, in lieu of Form 430, to submit ownership information as is done by our other wireless licensees under our Part I ULS Rules. We received no comments opposed to our proposal. Bell South supports the proposed new rules regarding ownership information.[508] Currently, wireless licensees use Form 602 to file ownership information electronically in ULS.[509] FCC Form 602 and FCC Form 430 request the same ownership information.[510] We note that on June 14, 2002, the WTB stopped accepting electronically filed Forms 430 temporarily.[511] Therefore, during the transition period, BRS and EBS licensees may continue to file the Form 430 manually. We believe that requiring BRS and EBS licensees to file Form 602 is one more step in reducing the number of forms that BRS and EBS licensees have to deal with and will also bring these services under the same licensing requirements as our other wireless services. Accordingly, we adopt our

[503] *See* 47 U.S.C. § 310.

[504] *See ULS NPRM*, 13 FCC Rcd 9672, 9691 ¶ 43 (1998).

[505] ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information, and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of another licensee (Party B), Party A's FCC-regulated businesses may be automatically copied to Party B's filing. Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, *Public Notice*, 17 FCC Rcd 16779 (2002).

[506] *See* Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting of Ownership Information on FCC Form 602, DA 99-1001, *Public Notice*,14 FCC Rcd 8261 (May 25, 1999) (*WTB Frequently Asked Questions*).

[507] *See NPRM*, 18 FCC Rcd at 6795-96 ¶ 181.

[508] *See* BellSouth Comments at 13-14 n.21.

[509] ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information, and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of another licensee (Party B), Party A's FCC-regulated businesses may be automatically copied to Party B's filing. Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, *Public Notice*, 17 FCC Rcd 16779 (2002).

[510] *See WTB Frequently Asked Questions, supra*, n.506.

[511] Wireless Telecommunications Bureau to Temporarily Suspend Electronic Filing of FCC Form 430 via the Broadband Licensing System, *Public Notice*, 17 FCC Rcd 11131 (2002).

proposal to require BRS and EBS licensees to file Form 602, in lieu of Form 430.[512]

10. Regulatory Status

226. *Background.* Consistent with our goal to maximize flexibility, we tentatively concluded in the *NPRM* that MDS and ITFS applicants may request more than one regulatory status for authorization in a single license. [513] Under this approach, MDS and ITFS applicants could authorize a combination of common carrier and non-common carrier services in a single license and licensees in the band could render any kind of communications service (e.g., fixed, mobile, point-to-multi-point) consistent with that regulatory status and the existing rules. This proposal is consistent with the approach we have used for other services licensed on a geographic area basis.[514] Applicants would not be required to describe the services they seek to provide but would be required to designate the regulatory status of services they intend to provide using Form 601.[515] We sought comment on what procedures to adopt for licensees to change their regulatory status (i.e., notify the Commission within a certain timeframe or seek prior approval).[516]

227. *Discussion.* We conclude that we will permit BRS and EBS applicants to request more than one regulatory status for authorization in a single license. We also conclude that BRS and EBS applicants must follow the notification procedures set forth in Section 27.10(c) of the Commission's Rules.[517] Bell South supports our proposal.[518] Similarly, EarthLink supports discarding the Commission's broadcast-style regulatory model for MDS and ITFS and urges Commission reliance instead on a Part 27-like regulatory scheme for the LBS and UBS.[519] Likewise, the Coalition agrees, and in response to the *NPRM's* inquiry regarding the appropriate procedures for an MDS or ITFS licensee to change its regulatory status, the Coalition submits that Section 27.10(c) should serve as the model.[520] CTIA contends the MDS and ITFS Bands should be configured to optimize their usability for CMRS services.[521] Likewise, AHMLC and IMLC observe that under the new flexible use rules proposed in the *NPRM* for the MDS and ITFS bands, licensees could conceivably use the spectrum that falls within the statutory definition of a commercial mobile radio service.[522] We agree with AHMLC and IMLC that to the extent MDS and ITFS licensees elect common carrier status, they should be exempt from tariff obligations under

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[512] *See infra* ¶¶ 252-256 (discussion of FCC Forms).

[513] *See NPRM*, 18 FCC Rcd at 6796 ¶ 182.

[514] *See e.g.*, 47 C.F.R. §§ 27.10, 101.511, 101.133.

[515] *See ULS R &O*, 13 FCC Rcd at 21027 Appendix C.

[516] *See NPRM*, 18 FCC Rcd at 6796 ¶ 182.

[517] Section 27.10(c)(2) of the Commission's Rules provides that [a]mendments to change, or add to, the carrier regulatory status in a pending application are minor amendments filed under § 1.927 of this chapter." 47 C.F.R. § 27.10(c)(2). *See* Section IV.D.3, *supra* (discussion of major and minor amendments).

[518] *See* BellSouth Comments at 13-14 n.21.

[519] *See* EarthLink Comments at 7. We note that we plan on relying on a Part 27 type regulatory scheme for the MBS, as well as the LBS and UBS. *See* Section IV.A.4, *supra* (discussion of geographic area licensing).

[520] *See* Coalition Comments at 142.

[521] *See* CTIA Comments at 3.

[522] *See* AHMLC Comments at 8, 24; IMLC Comments at 11.

Title II of the Communications Act.[523]

228. Accordingly, licensees in the band will be permitted to request more than one regulatory status for authorization in a single license pursuant to the notification procedures set forth in Section 27.10(c) of the Commission's Rules.[524] Allowing licensees in BRS and EBS to choose from among several regulatory status categories furthers our policy goals of: promoting innovation by maximizing flexibility in the service rules, and simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

11. Discontinuance, Reduction or Impairment of Service

229. *Background.* In the *NPRM*,[525] we sought comment on consolidating forfeitures, cancellation and discontinuance of service rules for MDS and ITFS licensees. These service rules are currently contained in five separate rule sections for MDS licensees, and three separate rule sections for ITFS licensees.[526] Because a system can have both ITFS and MDS channels, we believe that consolidating these rules will be advantageous to both the industry and the Commission staff. Thus, we tentatively concluded in the *NPRM* that consolidating these rules would reduce the confusion of the industry as to the appropriate rules and increase the efficiency of the Commission staff in processing these actions.

230. The Commission implemented its license forfeiture rules to ensure station operation and alleviate concerns about spectrum warehousing.[527] We note that presently MDS licensees may alternate between providing service as a common carrier or a non-common carrier.[528] However, before alternating, the licensee must notify the Commission of the change at least thirty days before the change.[529] Additionally, common carriers who seek to alternate or who otherwise intend to reduce or impair service must notify all affected customers of the planned discontinuance, reduction, or impairment on or before providing notice to the Commission.[530] These provisions concerning licensees alternating between common carrier and non-common carrier status are in our Part 27 Rules, which we have concluded will contain the BRS and EBS rules henceforth.[531]

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[523] *See* Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1418; *see also* 47 CFR § 20.15 (2003).

[524] *See* 47 C.F.R. § 27.10(c).

[525] *See NPRM,* 18 FCC Rcd at 6798 ¶¶ 186 -188.

[526] *See* 47 C.F.R. §§ 21.44, 21.303, 21.910, 21.932, 21.936, 73.3534, 73.3598, 74.932.

[527] *See* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, *Report and Order*, 11 FCC Rcd 13,449, 13,465 (1996).

[528] *See* 47 C.F.R. §§ 21.903(d), 21.910.

[529] *See* 47 C.F.R. § 21.903(d), which provides that the notification must state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

[530] *See* 47 C.F.R. § 21.910, which provides that the notice shall be in writing and shall include the name and address of the carrier, the date of the event, the area(s) affected and the channels that are affected by the event. *Id.* at § 21.910(b).

[531] *See* Section IV.D.2, *supra* (discussion of service specific rules).

231. *Discussion.* After reviewing the comments and taking into consideration the fundamental restructuring of the BRS and EBS bands, we conclude that we will eliminate our forfeiture, cancellation and discontinuance of service rules for certain licensees.[532] We note, however, that BRS and EBS Licensees that choose to act as fixed common carriers or fixed carriers will be subject to Section 27.66 of the Commission's Rules.[533]

232. We believe that eliminating our forfeiture, cancellation and discontinuance of service rules for certain licensees provides both existing EBS and BRS licensees and potential new entrants with greatly enhanced flexibility in order to encourage the highest and best use of spectrum to provide for the rapid deployment of innovative and efficient communications technologies and services.[534] By these actions, we make significant progress towards the goal of providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.[535]

233. As part of the fundamental changes to the BRS and EBS band, we seek to encourage BRS and EBS licensees to respond to market demands for next generation ubiquitous broadband wireless services and make investments in the future of such services. We believe this goal cannot be readily accomplished if BRS and EBS licensees have to focus their resources on preserving legacy services solely because renewal approaches and licensees fear losing their authorizations if the discontinuance of service and forfeiture rules are not eliminated. Furthermore, the move to next generation services for BRS and EBS providers also entails a transition period where licensees will be forced to go dark and discontinue service during the actual transition.[536] Accordingly, we conclude that it would be inappropriate to penalize BRS and EBS licensees while they migrate to the new band plan.

234. Finally, we also note that as part of the fundamental restructuring of the BRS and EBS band to provide for a more flexible, market-based approach, we are replacing the existing site-based

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[532] We note, however, that our cancellation and forfeiture rules will remain in effect for instances where there is a failure to make installment payments.

[533] Section 27.66, 47 C.F.R. § 27.66, of the Commission's Rules provides in pertinent part:

§ 27.66 Discontinuance, reduction, or impairment of service.
(a) Involuntary act. If the service provided by a fixed common carrier licensee, or a fixed common carrier operating on spectrum licensed to a Guard Band Manager, is involuntarily discontinued, reduced, or impaired for a period exceeding 48 hours, the licensee must promptly notify the Commission, in writing, as to the reasons for discontinuance, reduction, or impairment of service, including a statement when normal service is to be resumed. When normal service is resumed, the licensee must promptly notify the Commission.
(b) Voluntary act by common carrier. If a fixed common carrier licensee, or a fixed common carrier operating on spectrum licensed to a Guard Band Manager, voluntarily discontinues, reduces, or impairs service to a community or part of a community, it must obtain prior authorization as provided under § 63.71 of this chapter. An application will be granted within 31 days after filing if no objections have been received.
(c) Voluntary act by non-common carrier. If a fixed non-common carrier licensee, or a fixed non-common carrier operating on spectrum licensed to a Guard Band Manager, voluntarily discontinues, reduces, or impairs service to a community or part of a community, it must give written notice to the Commission within seven days.

[534] Federal Communications Commission, Strategic Plan FY 2003-FY 2008 at 5 (2002) (*Strategic Plan*).

[535] *Id.* at 14.

[536] See discussion of transition at Section IV.A.5, *supra*.

licensing scheme for the BRS and EBS with geographic area licensing for these services.[537] This is consistent with Commission actions over the past decade shifting away from site-based licensing for wireless licensees toward more flexible, geographic-area based allocations that provide licensees with greater freedom to provide different types of services. In making this shift, the Commission has adopted performance benchmarks that increase licensees' flexibility to offer a variety of services, including service that may not require ubiquitous geographic coverage. In a related matter, we believe that adopting specific safe harbors and performance requirements for the BRS and EBS bands will ensure service to customers, while at the same time speeding the provision of next generation wireless broadband services. Consequently, in the *FNPRM* portion of this document, we seek comment on what performance requirements and safe harbors to adopt for the BRS and EBS services.[538]

235. The Coalition argues that consistent with other Part 27 flexible use services, the Commission should eliminate the existing MDS and ITFS rules subjecting licenses to cancellation if spectrum is not used for brief periods of time or if licensed facilities are temporarily dismantled.[539] Specifically, the Coalition explains that some licensees will be required to cease their current operations pursuant to the transitional process it proposes.[540] The Coalition further asserts that many licensees retain a strong interest in discontinuing the provision of wireless cable services or first generation broadband service so that they can migrate to second generation broadband services once the Commission revises its rules and such action should be encouraged. The Coalition states that there is no public interest benefit to preserving non-viable services solely because renewal approaches. Nonetheless, the Coalition asserts, this will be the end result if we take a snapshot approach pursuant to our rules.[541] We concur with the Coalition.

236. Bell South supports the proposed new rules regarding discontinuance, reduction or impairment of service.[542] Sprint argues the discontinuance provisions set forth at Section 21.303 of the Commission's rules should be deleted or modified to account for the technology and spectrum transitions contemplated by this proceeding. Sprint further asserts the market-driven service goals of the Commission will be thwarted if licensees are effectively forced to continue the provision of obsolete services merely to preserve their authorizations.[543] Similarly, Nextel agrees that these discontinuance rules should be eliminated.[544]

237. AHMLC and IMLC argue the Commission should simply abolish Section 21.303,[545] which requires licensees to offer service to customers at least once a year. AHMLC and IMLC note that a licensee wanting to deploy an advanced system under the rules now under consideration would

[537] See discussion of geographic area licensing at IV.A.4, *supra*.

[538] See discussion of substantial service and performance requirements at Section V.B, *infra*.

[539] *See* Coalition Comments at 84, 92-93. *See also Co*alition Proposal, Appendix B at n.9.

[540] *See* Coalition Comments at 84, 92-93. *See also Co*alition Proposal, Appendix B at n.9.

[541] *See* Coalition Comments at 84, 92-93. *See also Co*alition Proposal, Appendix B at n.9.

[542] *See* BellSouth Comments at 13-14 n.21.

[543] *See* Sprint Comments at 18.

[544] *See* Nextel Reply Comments at 16.

[545] *See* 47 C.F.R. § 21.303.

nonetheless have to continue providing service to at least some legacy subscribers or risk forfeiture under Section 21.303. Therefore, AHMLC and IMLC assert that it makes no sense to compel the provision of uneconomical and inefficient service to simply meet Commission rules. [546] We agree with AHMLC and IMLC.

238. Grand Wireless argues providing service to the public should be the primary consideration that allows for preservation of licenses and spectrum. Grand Wireless and Pace further assert that different geographical service areas will grow at different rates with additional channels put into service as the operation warrants. They note that the transition to advanced wireless services whose offerings are still in their infancy will result in a staggered usage of spectrum over time particularly in rural areas. Thus Grand Wireless and Pace state that as time goes by, additional channels will be placed into service as demand grows, and the speed with which additional channels are placed into service depends in large part on the service area with rural areas being slower than urban areas.[547] We agree that this is yet another reason to eliminate our forfeitures, cancellation and discontinuance of service rules for BRS and EBS licensees.

239. In sum, we conclude that our decision to eliminate our forfeiture, cancellation and discontinuance of service rules for certain classes of BRS and EBS licensees is supported by comments in the record, as well by consideration for the fact that BRS and EBS licensees will be transitioning to new innovative next-generation technologies, and may be forced to go dark during transition. Our market-driven service goals will not be reached if licensees are forced to continue providing obsolete services solely to preserve their authorizations. We see no public interest benefit to preserving non-viable services solely because renewal approaches. We believe that eliminating these rules allows for innovative, flexible use of the spectrum.

12. Foreign Ownership Restrictions

240. *Background.* In the *NPRM* we sought comment on establishing regulatory parity for applicants requesting authorization solely for non-common carrier services and applicants requesting authorization for common carrier services. [548] We note that Sections 310(a) and 310(b) of the Communications Act, as modified, impose foreign ownership and citizenship requirements that restrict the issuance of licenses to certain applicants.[549] An applicant requesting authorization only for non-common carrier services would be subject to Section 310(a), but not to the additional prohibitions of section 310(b). In contrast, an applicant requesting authorization for common carrier services would be subject to both Sections 310(a) and 310(b). By establishing parity in reporting obligations, however, we did not propose a single, substantive standard for compliance.[550]

[546] AHMLC Comments at 22; IMLC Comments at 22.

[547] Grand Wireless Comments at 13; Pace Comments at 8.

[548] *See NPRM,* 18 FCC Rcd at 6796 ¶ 189. We are aware that in the *NPRM* we sought comment on implementing this requirement pursuant to Part 101 of the Commission's Rules; however, as noted in ¶¶ 184-190 *supra*, we have decided to regulate the MDS and ITFS pursuant to Part 27 of the Commission's Rules.

[549] 47 U.S.C. § 310(a), (b).

[550] For example, we do not and would not deny a license to an applicant requesting authorization exclusively to provide services not enumerated in Section 310(b), solely because its foreign ownership would disqualify it from receiving a license if the applicant had applied for a license to provide the services enumerated in Section 310(b).

241. *Discussion.* We conclude that common carriers and non-common carriers seeking to operate in BRS and EBS should not be subject to varied reporting obligations.[551] Consistent with our determination to regulate services in the band pursuant to Part 27 of the Commission's Rules, we agree with the Coalition that Sections 27.12, 1.913, and 1.919 of the Commission's Rules should be utilized to implement this policy.[552] Accordingly, we adopt rules for applicants requesting authorization for either common carrier or non-common carrier status to file changes in foreign ownership information pursuant to those sections.[553] This action furthers our goal of fostering regulatory parity and transparency between like services. We also believe this is yet another step in simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

13. Annual Reports

242. *Background.* The Commission's rules require MDS operators to file annual reports even if they are in full compliance with all of our rules.[554] Inasmuch as these rules appear to be unnecessary, in the *NPRM*, we sought comment on eliminating these requirements.[555]

243. *Discussion.* After reviewing the comments we received on this issue, we conclude that we will eliminate the requirement that BRS operators file annual reports with the Commission. BellSouth, AHMLC and IMLC support the planned elimination of the Section 21.911 Report.[556] Similarly, the Rural Commenters believe that the Section 21.911 Annual Report can be eliminated at no loss to the effectiveness of the Commission's mission.[557] Likewise, the Coalition agrees that the Commission has correctly concluded that "these reports do not appear to serve any purpose."[558] IMLC states the annual filing of this report no longer serves a useful purpose and notes that as MDS and ITFS usage moves into a digital mode, it will become difficult, if not impossible, to report what content is being transmitted over "channels" of fluctuating definition. Additionally, IMLC believes there is no need for an additional EEO

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[551] As was observed in the *LMDS 2d R&O*, requiring submission of ownership information that may not be immediately necessary to assess the qualifications of a licensee (*i.e.*, one who currently operates as a non-common carrier) is an efficient and reasonable measure to facilitate the flexibility accorded licensees to change status with a minimum of regulatory interference. With this approach, updated information can be used whenever the licensee changes to common carrier status without imposing an additional filing requirement when the licensee makes the change. Moreover, having access to this ownership information allows the Commission to monitor all of the licensed providers more effectively, in light of their ability to provide both common and non-common carrier services. We stress that our decision to regulate MDS and ITFS pursuant to Part 27 rather than pursuant to Part 101, which regulates LMDS, does not make this line of reasoning inapplicable. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) (*LMDS 2d R&O*).

[552] *See* 47 C.F.R. §§ 27.12, 1.913, 1.919. *See also* Coalition Comments at 142.

[553] *See* 47 C.F.R. §§ 27.12, 1.913, 1.919.

[554] *See* 47 C.F.R. § 21.911.

[555] *See NPRM*, 18 FCC Rcd at 6806 ¶ 203.

[556] *See* AHMLC Comments at 6; IMLC Comments at 9-10; *See* BellSouth Comments at 13-14 n.21.

[557] *See* Rural Commenters Comments at 6.

[558] *See* Coalition Comments at 142.

Report required by Section 21.920 of the Commission's rules,[559] and this report should either be eliminated or made a question on the annual EEO outreach reporting form due on September 30 of each year.[560] Consistent with our tentative conclusion in the *NPRM* to eliminate annual reports,[561] as well as our determination today to place the BRS and EBS in Part 27 of our rules, we eliminate the EEO annual report. Accordingly, we eliminate the requirement that BRS operators file annual reports with the Commission. Doing so simplifies the licensing process and deletes obsolete or unnecessary regulatory burdens.

14. Application Processing

244. *Background.* In the *NPRM* we sought comment on streamlining our application procedures. We tentatively concluded that the interactive nature of ULS will enhance the on-line capabilities of MDS and ITFS users, and therefore proposed to integrate the Services into ULS. [562] Currently, our MDS and ITFS application processing is cumbersome, time-consuming, and resource intensive. As noted above,[563] we are adopting rules herein that replace the requirement to separately license individual transmitters with a geographic area licensing scheme in which most operations would be authorized pursuant to the geographic area license. This change will substantially reduce burdens on licensees, expedite the initiation of service, and provide greater flexibility. Nonetheless, we note that there will continue to be limited instances in which transmitters will have to be licensed individually. Thus, we believe it is appropriate to review and streamline our application procedures.

245. With respect to the processing of ITFS applications, our rules currently require several burdensome steps that result in delays to the public and hinder the efficient processing of ITFS applications.[564] Although our MDS application processing procedures appear quicker then the ITFS procedures, we believe MDS application filing procedures should also be stream-lined and consolidated.[565]

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[559] *See* 47 C.F.R. § 21.920.

[560] *See* IMLC Comments at 10. AHMLC, however, supports retaining the EEO Report required by Section 21.903 of our rules. *See* AHMLC Comments at 7.

[561] *See NPRM*, 18 FCC Rcd at 6806 ¶ 203.

[562] *See NPRM*, 18 FCC Rcd at 6806-8 ¶¶ 204-211.

[563] *See* Section *IV.A.4.a supra* (discussion of geographic licensing).

[564] With respect to the processing of ITFS, our existing rules require the opening of a filing window before we will accept applications. *See* 47 C.F.R. § 74.911(c)(1) and (d). Then we must announce a one-week filing period for applications for major changes, high-power signal booster station, response station hub and R channels point-to-multipoint transmissions licenses. At the conclusion of the one-week filing period, we announce the tendering for filing of applications submitted during the filing window and provide a sixty-day filing window for applicants to amend their applications. *See* 47 C.F.R. § 74.911(d). At the conclusion of the sixty-day filing window, we announce the acceptance for filing of all applications submitted during the initial window, as amended by the applicants. Opposing parties receive sixty days from the release of the public notice announcing the acceptance for filing of the applications to file a petition to deny against an application. *See* 47 C.F.R. § 74.911(d). On the sixty-first day, we grant the unopposed applications unless we notified the applicant that we were not granting the application.

[565] Generally, upon receipt of an MDS application, we give the application a file number. *See* 47 C.F.R. § 21.26. After preliminary review, we place those applications that appeared complete on public notice as accepted for filing. *See id.* However, with regard to MDS two-way application filings, we currently use a rolling one-day filing window. *See* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed (continued....)

246. Previously, applicants could file and view their applications on-line using the Broadband Licensing System (BLS).[566] On October 11, 2002, the Wireless Bureau suspended the electronic filing capabilities of the BLS in order to improve the integrity of data in the BLS, prepare for converting the ITFS and MDS services to the ULS, and facilitate future enhancements to electronic filing.[567]

247. *Discussion.* We did not receive any comments opposing streamlining our ITFS and MDS application procedures. Thus, we conclude that conversion of the data from BLS to ULS will improve the efficiency of filing applications, as well as searching for data on these services. In this vein, we note that we require the majority of the wireless applicants to file their applications electronically using ULS. ULS has eliminated the need for wireless carriers to file duplicative applications and has increased the accuracy and reliability of licensing information for wireless services. Additionally, ULS has increased the speed and efficiency of the application process because wireless licensees and applicants can file all licensing-related applications and other filings electronically. Since the implementation of ULS, the public may access all publicly available wireless licensing information on-line.[568]

248. We conclude that the interactive nature of ULS will streamline the BRS and EBS licensing process,[569] as well as reduce the present lengthy licensing process. For instance, generally, upon filing of an application in ULS we place the application on public notice as accepted for filing.[570] The extra step of allowing applicants to amend their applications to make corrections is not necessary with ULS.

249. By consolidating the BRS and EBS application processing procedural rules in Part 1 of the Commission's Rules, we improve the consistency of the Commission's rules across wireless services and provide a single point of reference for applicants, licensees, and the public seeking information regarding our licensing procedures. We conclude this consolidation will reduce confusion among applicants or licensees, increase the probability that filings will be done correctly, accelerate the

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Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19150 (1998); 47 C.F.R. § 21.27(d). We announce the "tendering for filing" of applications submitted during the filing window. *See* Commission Announces Initial Filing Window for Two-Way Multipoint Distribution Service and Instructional Television Fixed Service, *Public Notice*, 15 FCC Rcd 5850 (MMB 2000). Then, after a sixty-day period, we released a second public notice announcing those applications that we accepted for filing.[565] *See* 47 C.F.R. § 21.27(d).

[566] Mass Media Bureau Implements, *Public Notice*, 2000 WL 684792 (2000) (*BLS Implementation PN*).

[567] Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 17 FCC Rcd 18365 (2002). We note that effective March 25, 2002, the Commission transferred the regulatory functions for the Services from the former Mass Media Bureau to the Wireless Telecommunications Bureau. Radio Services are Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002).

[568] *ULS R&O*, 13 FCC Rcd at 21031 ¶ 4.

[569] Because ULS is interactive, ULS prompts the applicant to input the required information for the type of action that the applicant seeks. As a result, applicants must submit all the appropriate information before they may file their applications electronically in ULS. *See* Phase I Mandatory Electronic Filing Deadline Extended for PCIA and ITA, *Public Notice*, 16 FCC Rcd 13,681 (2001) (the Commission extended the deadline for mandatory electronic filing to July 25, 2001). Notably, ULS will automatically "pre-fill" licensee information already in the system and will display only the portions of the form and schedules that require completion for the applicant's or licensee's indicated purpose.

[570] *See* 47 C.F.R. § 1.933(1).

application process, and speed wireless service to the public. Accordingly, we adopt rules that streamline our application procedures for BRS and EBS by integrating the Services into ULS.[571]

15. Returns and Dismissals of Incomplete or Defective Applications

250. *Background.* In the *NPRM*, we proposed to extend our uniform rule for dismissal or return of defective applications in the Wireless Services to ITFS and MDS applications and adopt the Wireless Bureau's procedures for complying with the Commission's uniform policy.[572] As noted above,[573] in some instances ITFS and MDS applicants submitted applications that were incomplete or required the submission of additional information before they could be placed on public notice as accepted for filing, which resulted in inefficient processing of applications.

251. The Commission in the *ULS Report and Order* adopted a uniform application dismissal and return rule for all the Wireless Services.[574] Pursuant to the uniform rule articulated therein, the Commission has the discretion to return applications for correction on minor filing errors, but is also authorized to dismiss any incomplete or defective application without prejudice.[575] In this connection, regardless of the manner in which applicants submit their applications, ULS will automatically dismiss applications that are unsigned, untimely, or not fee-compliant.[576] The Commission explained in the ULS *R&O* that in contrast to minor filing errors, such defects were "fatal to the consideration of the application."[577]

252. WTB, however, has announced specific procedures for complying with the Commission's uniform policy.[578] WTB has concluded that, "[g]enerally, timely filed renewal applications and construction notifications that are otherwise defective will be returned to the applicants for correction, rather than dismissed by the Bureau."[579] Nonetheless, the Bureau clarified "that renewal applications and construction notifications that fail to comply with the applicable fee and signature requirements will be dismissed by the Bureau as defective, rather than returned to the applicants for correction, even if timely

[571] In most instances, applicants will not be required to file applications in order to relocate or add transmitters within their GSA. *See* discussion on Geographic Area Licensing, Section IV.A.4, *supra*.

[572] *See NPRM*, 18 FCC Rcd at 6808-9 ¶¶ 212-215.

[573] *See* ¶ 245, *supra*.

[574] *See ULS R&O*, 13 FCC Rcd at 21027; *See also* 47 C.F.R. § 1.934.

[575] *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90.

[576] *See, e.g., id.*

[577] *Id.*

[578] *See* Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, *Public Notice*, 17 FCC Rcd 30 (WTB 2001) (*Unified Dismissal and Return PN*); Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, *Public Notice*, 14 FCC Rcd 11182, 11185 (WTB 1999); Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications, *Public Notice*, 14 FCC Rcd 5499 (WTB 1999).

[579] *Unified Dismissal and Return PN*, 17 FCC Rcd at 30.

filed."[580]

253. *Discussion.* We received no comments opposing our proposal. Accordingly, we adopt the Commission's uniform rule for dismissal or return of defective applications in the Wireless Services to EBS and BRS applications along with the Bureau's procedures for complying with the Commission's uniform policy. These steps will ensure efficient processing and equal treatment of all applications, while simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

16. ULS Forms

254. *Background.* In the *NPRM*,[581] we noted that currently our rules require MDS and ITFS applicants to use eleven different forms to request licensing actions.[582] We tentatively concluded that we would streamline these procedures by replacing the eleven forms that MDS and ITFS applicants presently use with the four forms that we use to license other wireless services in ULS and sought comment on this proposal. The Commission consolidated the ULS application forms for wireless services to replace approximately forty-one application forms.[583] The consolidation streamlined the processing of applications and reduced the filing burden for wireless applicants and licensees.[584] We use four forms in ULS – Form 601 (Long-Form or FCC Application for Wireless Telecommunications Bureau Radio Service Authorization), Form 602 (FCC Ownership Disclosure Information for the Wireless Telecommunications Bureau), Form 603 (FCC Wireless Telecommunications Bureau Application for Assignment of Authorization or Transfer of Control) and Form 605 (Quick-Form Applications for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services.[585]

255. *FCC Form 601.* Under our proposal, this form will replace FCC Forms 304, 304A, 330, 330A, 330R, 331, 405, 701 and most informal application filings. The FCC Form 601 and associated schedules will be used to apply for initial authorizations, modifications (major and minor) to existing authorizations, amendments to pending applications, renewals of station authorizations, developmental authorizations, special temporary authorities (STAs), certifications of construction, requests for extension of time, cancellations, and administrative updates. The required schedules are:

- New/Modification/Amendment (Regular Authorizations, Developmental Authority and Special Temporary Authority) – FCC Form 601 Main Form with required technical schedule.
- Renewals/Cancellation/Administrative Updates – FCC Form 601 Main Form and Schedule A (if requesting multiple call signs).[586]

[580] *Id.* at 32.

[581] *See NPRM*, 18 FCC Rcd at 6809-11 ¶¶ 215-219.

[582] The MDS and ITFS application forms are FCC Forms 304, 304A, 305, 306, 330, 330A, 330R, 331, 405, 430, and 701.

[583] *ULS R&O*, 13 FCC Rcd at 21033-34 ¶ 10.

[584] *Id.*

[585] *Id.*

[586] *See* 47 C.F.R. § 1.949 for the rules governing renewals.

- Certifications of Construction – FCC Form 601 Main Form and Schedule K.
- Extension of Time to Construct – FCC Form 601 and Schedule L.

256. *FCC Form 602.* This form will replace the FCC Form 430 for the submission of initial and updated ownership information for those wireless radio services that require the submission of such information.[587]

257. *FCC Form 603.* This form will replace FCC Forms 305, 306 and 330. Applicants use the FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. Additionally, applicants use the form to apply for partial assignments of authorization, including partitioning and disaggregation. The required schedules are:

- Assignment/Transfer of Control – FCC Form 603 Main Form and Schedule A for auctionable services.[588]
- Partitioning & Disaggregation – FCC Form 603 Main Form and Schedule B or Schedule D as required.
- Consummation Notifications – FCC Form 603 and Schedule D.
- Extension of Time for Consummation – FCC Form 603 and Schedule E.

258. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that eliminating the current MDS and ITFS forms and replacing them with the ULS forms will streamline the processing of applications and reduce the filing burden for MDS and ITFS applicants and licensees. We received no comments opposing the replacement of the forms that MDS and ITFS licenses currently use the four ULS forms. AHMLC and IMLC support the planned elimination of Form 430 in favor of Form 602.[589] The Rural Commenters believe that the Section 21.11(a) requirement for annual updates of the FCC Form 430 Licensee Qualification Report can be eliminated at no loss to the effectiveness of the Commission's mission. We find this a curious comment in that we are now requiring BRS and EBS applicants to update their ownership information pursuant to FCC Form 602.[590]

[587] *See* n.477, *supra*; 47 C.F.R. § 0.408.

[588] *See* 47 C.F.R. § 1.948.

[589] *See* AHMLC Comments at 6; IMLC Comments at 8-9. AHMLC, however, observes that certain legal qualifications information called for by Form 430 (status of criminal and antitrust litigation) is not called for by Form 602. *See id.* We agree with AHMLC's observations, however, we believe that MDS and ITFS applicants should only have the same Form 602 requirements as all our other wireless services, which is consistent with the streamlining goals of this proceeding.

[590] *See* Rural Commenters Comments at 6. We note that FCC Form 602 must be filed or updated under the following circumstances:

- Applicants filing to obtain a new license or authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. § 1.919(b)(1).
- Applicants filing to renew an existing license or authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. § 1.919(b) (2).
- Applicants requesting approval for a transfer of control of a license or assignment of an authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. §§ 1.919(b) (3), 1.948(c).

(continued....)

Accordingly, we adopt rules to use the ULS forms for BRS and EBS, thereby eliminating the current MDS and ITFS forms. We note that by using the ULS Forms, we will eliminate a number of obsolete MDS and ITFS forms from our rules.[591]

17. Transition Periods

259. *Background.* In the *NPRM*, we proposed to allow continued use of the current ITFS and MDS forms for a transition period of six months after the effective date of the release of an *R&O* in this proceeding.[592] This period is consistent with the transition period the Commission used with the initial implementation of ULS.[593] At the conclusion of this period, only ULS forms would be accepted for these services. We noted that in the ULS *R&O*, the Commission provided a transition period for applicants and licensees to use ULS voluntarily before implementing mandatory electronic filing using the ULS forms.[594] Generally, the Commission determined that permitting a six-month transition period was appropriate.[595] Further, we noted that the six-month transition period has worked reasonably well for the other services that have transitioned to ULS.[596]

260. *Discussion.* We conclude that the proposed six month period for transitioning to mandatory electronic filing is appropriate. We note that we received no comments opposing our proposal. AHMLC and IMLC believe establishing a 180-day period for assignments of authorization and transfers is consistent with the general ULS rule.[597] Similarly, OWTC believes the 6-month transition period will help licensees understand any new or consolidated forms. In light of the significant changes proposed to the EBS and BRS forms and rules, we agree with OWTC and believe applicants and licensees should receive a transition period to familiarize themselves with ULS and begin using ULS forms. This period will provide EBS and BRS applicants and licensees with sufficient time to familiarize themselves with ULS and to plan an orderly transition from using existing forms to using the ULS forms. Accordingly, we adopt a six-month transition period after the effective date of the rules we have adopted today before requiring mandatory electronic filing by BRS and EBS applicants and licensees in ULS. Consistent with prior actions, WTB will release a public notice announcing the relevant commencement date for the processing of applications in the Services via ULS.[598]

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- Applicants filing a notification of consummation of a *pro forma* transfer of control of a license or assignment of authorization under the Commission's forbearance procedures who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. §§ 1.919(b)(4), 1.948(c)(1)(iii), 1.948(d).

[591] *See e.g.* 47 C.F.R §§ 73.3500, 73.3536 (elimination of all references to FCC Form 330-L, "Application for Instructional Television Fixed Station License); 47 C.F.R. §§ 21.11(b), 73.3500, 73.3533(b) (elimination of all references to FCC Form 307). In addition, we propose to delete references to obsolete MDS forms mentioned in Part 74. *See* 47 C.F.R. § 74.991.

[592] *See NPRM,* 18 FCC Rcd at 6811-13 ¶¶ 220-225.

[593] *See ULS R&O,* 13 FCC Rcd at 21027, 21038-39 ¶ 16.

[594] *See id.* at 21042-43 ¶ 24.

[595] *See id.*

[596] *See ULS R&O,* 13 FCC Rcd at 21042-43 ¶ 22-4.

[597] *See* AHMLC Comments at 7; IMLC Comments at 10.

[598] *See, e.g., Public Notice:* Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services (DA 99-154, rel. Aug. 30, 1999).